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APPENDIX A

WILLIAM H. KELLEY, Petitioner-Appellee,
v.
SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, Secretary Florida Department of Corrections, Respondent-Appellant.

No. 03-10513

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

July 23, 2004, Decided

July 23, 2004, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 92-14246-CV-NCR. Kelley v. Singletary, 238 F. Supp. 2d 1325, 2002 U.S. Dist. LEXIS 26211 (S.D. Fla., 2002)

DISPOSITION: Reversed.

COUNSEL: For Secretary for the Department of Corrections, Appellant: Dittmar, Carol M., Office of Atty. Gen., Dept. of Legal Affairs, Tampa, FL.

Kelley, William H., Appellee: Lohman, James Charles, Attorney at Law, Austin, TX.

JUDGES: Before TJOFLAT, ANDERSON and WILSON, Circuit Judges.

OPINIONBY: TJOFLAT

OPINION: TJOFLAT, Circuit Judge:

The petitioner, William H. Kelley, is a Florida prisoner on death row, having been convicted of first degree murder. The district court granted a writ of habeas corpus setting aside his conviction and sentence.[1] We reverse.

This case--from the time of the murder to the present--has spanned nearly thirty-eight years. Understandably, its history is quite complicated. For the readers' convenience, therefore, we preface the opinion with the following table of contents:

I. Factual Background

A. The Maxcy Murder

B. John Sweet's Trial

C. Kelley's State Legal Proceedings

1. Kelley's Arrest

2. Kelley's Two Trials

3. Kelley's Direct Appeal

4. Kelley's Rule 3.850 Motion and Appeal

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[1] The district court granted the writ on two grounds: (1) that the prosecutor denied the petitioner due process of law by withholding exculpatory evidence in violation of the rule laid down in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); and (2) that petitioner's attorneys denied him of his right to effective assistance of counsel at trial.

5. Kelley's Motion for Habeas Corpus Relief from the Florida Supreme Court

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A. Kelley's Federal Habeas Petition

B. Kelley's Federal Evidentiary Hearing

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I.

Factual Background

A. The Maxcy Murder

This sordid tale begins with an illicit love affair between John Sweet, a real estate broker with shadowy ties to Boston's criminal underworld, and Irene Maxcy, who was married to Charles von Maxcy ("Maxcy"), a wealthy citrus grower. It culminates in Maxcy's assassination at the hands of two hit men. The investigation and legal proceedings following the murder have spanned almost four decades and have involved some of the best known lawyers in the country.

The district court described the circumstances leading up to and surrounding Maxcy's murder as follows:

Irene Maxcy and John Sweet were lovers, and they planned to kill Irene's husband, Charles von Maxcy, a wealthy citrus grover [sic] and rancher from Sebring, Florida. Sweet and Irene talked for months about the murder, after which they planned to live together on Maxcy's large estate. Sweet contacted an acquaintance, William Bennett of Boston, Massachusetts. Arrangements were made, and a price was set: $ 5000 up front, and $ 15,000 after the murder.

On October 1, 1966, Sweet went to Daytona, Florida to meet Andrew von Etter. Von Etter was to do the killing, along with a partner. The next day von Etter called Sweet to tell him the partner, "William Kelley", had arrived. On October 3rd, Sweet drove von Etter and "Kelley" to the estate. The alleged killers showed Sweet the weapons they would use, knives and a revolver, which they kept in a satchel. Sweet drove back to Sebring. Charles von Maxcy was murdered that day. A couple weeks later, Sweet went to Boston to pay the $ 15,000 balance due for the murder.

Unfortunately, the murder did not signal the beginning of a blissful life on the estate for Irene Maxcy and John Sweet. Sweet wanted more money, purportedly to pay off the murder balance, and he began to harass and threaten Irene and her five-year-old daughter daily. Terrified, Irene Maxcy went to the authorities. In exchange for immunity, she implicated Sweet in the murder-for-hire scheme.

Kelley v. Singletary, 222 F. Supp. 2d 1357, 1358 (S.D. Fla. 2002) (order granting habeas relief on claim (1)). Before Irene Maxcy came forward, a comprehensive investigation was underway. Special Agent Roma Trulock of the Florida Department of Law Enforcement ("FDLE") headed that investigation and interviewed potential eye witnesses. In particular he spoke with Kaye Carter, who met Kelley and Von Etter around the time of the murder at the Daytona Inn Motel, where the prosecution says the hit men lodged before they drove to Sebring to kill Maxcy.

B. John Sweet's Trial

Sweet was tried in the Circuit Court of Polk County, Florida. As the district court explained,

> Sweet was arrested in 1967, charged with first degree murder. It became known in the course of the investigation for Sweet's trial that the "triggermen" in the murder were named von Etter and "Kelley". These men were not charged at this time, however, as prosecutors felt they had insufficient evidence against them.
>
> Irene Maxcy was the star witness for the prosecution in Sweet's first trial. Her testimony was erratic and difficult as she denied, even under the protection of immunity, that she wanted to kill her husband. She testified it was entirely Sweet's idea. She claimed to have witnessed many of the phone calls Sweet had made in arranging the murder, and she related many of the details about which Sweet had kept her informed, including the murder itself. She further testified that she gave Sweet more than $ 35,000 to help pay for the murder, and that Sweet had wanted another $ 75,000. Sweet, testifying

on his own behalf, denied any involvement in the crime.

Id. at 1359. Sweet also launched a vitriolic character assault on Irene Maxcy, accusing her of partaking in a host of deviant sex acts. The trial ended in a hung jury.

In 1986, Sweet was tried a second time. Irene Maxcy testified against him again, and, again, Sweet denied any involvement in the murder. This time, however, Sweet was convicted of first degree murder and sentenced to life in prison.

Unfortunately, the second trial proceedings were tainted by an evidentiary irregularity. Sweet's defense team repeated their earlier attacks on the credibility of both Irene Maxcy and another important witness against Sweet: Roma Trulock, the primary investigator for Maxcy's murder. Sweet v. State, 235 So. 2d 40, 41 (Fla. 2d Dist. Ct. App. 1970). Defense counsel believed that Irene Maxcy and Trulock were engaged in a romantic relationship and, therefore, that Trulock had an interest in seeing Sweet incarcerated. To determine whether Irene Maxcy and Trulock would admit to the affair, the court permitted defense counsel to examine them outside the presence of the jury. Trulock denied the allegation vehemently, but Irene Maxcy did not. Irene Maxcy testified, among other things, that she and Trulock had engaged in sexual intercourse and that Trulock had expressed a desire to get Sweet convicted so that she and Trulock could take a trip to "the Islands." Id. at 41-42. The court excluded such testimony, sustaining the State's objection. Following his conviction, Sweet challenged the court's ruling on appeal. Id. at 40-41. In a two-to-one decision, the district court of appeal reversed Sweet's conviction and awarded a new trial. Id. at 42. In the court's view, "the proffered cross-examination in question went directly to undermine the very foundation of the State's case, i.e., the credibility of Irene Maxcy and C. R.

Trulock. Its exclusion was a substantial frustration of [Sweet's] right to effective cross-examination . . . ." Id.

After this ruling, Sweet's defense, citing Florida's speedy trial rules, filed a motion to discharge Sweet from prosecution. The state conceded that it could not proceed against Sweet again because key witnesses had become unavailable. On November 16, 1971, the circuit judge who had presided over Sweet's case found that he had "no course other than to grant the motion." Commending the efforts of the prosecution, the judge--in his own words--"reluctantly" ordered that Sweet "stand[s] discharged from further prosecution . . . ."

In April of 1976, the state attorney petitioned the circuit court to enter an order authorizing the clerk of the court to destroy certain physical evidence held for Sweet's prosecution. The court granted that petition, and several articles of evidence, including a bullet, a bloody bed sheet, and a shred from the victim's shirt, were destroyed.

Sweet had gotten away with murder, but his role in the prosecutor's pursuit of ~~the~~ matter had not ended. As the district court observed, after his conviction was reversed,

> John Sweet wasted little time in matriculating back into the underworld. By 1981, Sweet was facing charges in Massachusetts of prostitution, narcotics distribution, arson, bribery, counterfeiting, loan sharking, and hijacking, among other things. With authorities closing in on him, Sweet went to them first. His plan was to win immunity in exchange for information he had on the murder of Charles von Maxcy. William Kelley was the target, as Sweet implicated him as one of the murderers. The Massachusetts authorities brought Sweet to Florida where Sweet gave authorities there his

confession. The next day Sweet was awarded immunity in Massachusetts.

Kelley v. Sec'y for the Dep't of Corr., No. 92-14246 at 4 (S.D. Fla. Aug. 31, 2000) (order denying habeas claims (4)-(6)). On December 16, 1981, a Highlands County grand jury indicted the petitioner, William H. Kelley, for first degree murder.

C. Kelley's Arrest and Prosecution

1. Kelley's Arrest

William H. Kelley was arrested on June 16, 1983, roughly seventeen years after Maxcy's murder. By that time, Walter Bennett, who was Sweet's contact for the murder contract, and Andrew von Etter, who was Kelley's supposed partner in the killing, were both dead. Irene Maxcy, of course, had immunity for her role in the murder.

Three special agents of the FBI apprehended Kelley at a motel in Tampa, Florida. They had received a tip that a guest of the motel met Kelley's description. One of the agents, Ross Davis, testified at Kelley's trial that the FBI sought and arrested Kelley for "[u]nlawful flight to avoid prosecution" in North Carolina. The agents did not realize that Kelley was wanted for murder in Florida until they took him back to their Tampa office and conducted a background check. When Davis finally informed Kelley of his indictment for the Maxcy murder, Kelley made statements indicating knowledge of the crime and suggested that the State would never be able to obtain a conviction. These statements eventually became a subject of dispute at Kelley's trial.

2. Kelley's Two Trials

Kelley enlisted the assistance of several attorneys in preparing his case for trial. He was represented initially by

Robert E. Dinsmore of Boston and Ronald K. Cacciatore of Tampa. On October 20, 1983, however, Kelley, acting pro se, filed a document entitled "Discharge of Attorneys," which stated that Dinsmore and Cacciatore were no longer authorized to act on Kelley's behalf and that new counsel would begin representing him immediately. Kelley explained that this decision was in his best interest and was made without coercion or pressure from Dinsmore and Cacciatore. The same day, Nicholas G. Schommer, a lawyer practicing in Sebring,[2] moved the court to permit Dinsmore and Cacciatore to withdraw as Kelley's counsel. The court granted the motion.

On December 7, Schommer filed a notice of appearance, stating that he would act as Kelley's local counsel and that Kunstler and Mason, a New York law firm, would serve as Kelley's primary counsel. William Kunstler and Mark Gombiner, partners of the firm, moved the court on December 8 for leave to appear pro hac vice. The court granted their motion on December 20.

Sometime between December 20, 1983 and January 12, 1984, Jack Edmund of Bartow, Florida, joined Kunstler and Gombiner as part of Kelley's defense team.[3] Kunstler testified later[4] that he first met Edmund and, in fact, first learned of Edmund's role in the defense on January 12, 1984, when Kunstler came to Sebring to argue pretrial motions.

Prior to trial, Kelley's defense team also included a paralegal named Harvey Brower. Brower was formerly a Massachusetts lawyer, but as the district court explained,

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[2] Sebring is the county seat of Highlands County, Florida.

[3] Edmund did not file his notice of appearance as Kelley's co-counsel, however, until January 23, 1984.

[4] On July 18, 1988, Kunstler testified at the evidentiary hearing the circuit court held on Kelley's motion to vacate his conviction and sentence under Florida Rule of Criminal Procedure 3.850.

> Brower was disbarred from the practice of law in Massachusetts in August, 1979, for defrauding one of his clients. In re: Harvey Brower, No. 79-14BD (Mass. Aug. 16, 1979). Earlier in his Massachusetts legal career, Brower was censured by its Supreme Judicial Court for fraudulent conduct in negligence cases. In re Harvey Brower, No. 29871 Law (Mass. Feb. 23, 1973). Brower also was convicted in the Western District of Louisiana for unlawfully conspiring to aid and abet the crime of bail jumping. United States v. Marino, 617 F.2d 76, 78 (5th Cir. 1980).

Kelley v. Singletary, 238 F. Supp. 2d 1325, 1328 (S.D. Fla. 2002) (order denying habeas claim (3) but granting relief on claim (2)) (footnote omitted). The district court further noted that Brower's law office had also been involved in a counterfeit bond sale conspiracy. Brower's conduct in the course of Kelley's defense eventually played a critical role in the district court's conclusion that Kelley suffered ineffective assistance of counsel. It is not entirely clear how or when Brower became involved in the case. The record permits the inference that Brower arrived on the scene around the time Kelley decided to discharge Dinsmore and Cacciatore as his counsel. It is equally plausible, however, that Brower's services were first employed at Kelley's request even before Dinsmore was hired.

At the hearing the circuit court held in July 1988 on Kelley's Rule 3.850 motion to vacate conviction and sentence, Kunstler testified that Brower was the one who first contacted him about participating in Kelley's defense. In fact, Kunstler never met Kelley until he went to Sebring on January 12, 1984 for a motions hearing. Kunstler was under the

impression that Brower had represented Kelley on other matters in the past and that Brower would be preparing the case and virtually all of the pretrial motions. Kunstler expected that his own role would be confined to trial counsel alone, and he was not initially concerned with the amount of responsibility that would be entrusted to Brower. Kunstler expressed a great deal of confidence in Brower's ability despite the disbarment, and he regarded Brower as both an "excellent" lawyer and investigator. In fact, when Kunstler missed a hearing on pretrial motions, he recommended that the nonlicensed Brower argue the motions in his stead.[5]

Kelley's trial began in January of 1984. By that time, Brower had disappeared. As the federal district court later observed, "Kunstler characterized Brower as a thief who 'absconded' with fees without ever performing his investigatory duties." Kelley, 238 F. Supp. 2d 1325, 1328 (S.D. Fla. Dec. 30, 2002). Kunstler and Edmund were the dominant players in Kelley's defense.[6] Kunstler took primary responsibility for many of the most important trial tasks, including the cross-examination of the state's star witness, John Sweet. The jury was unable to reach a verdict, and on January 30, the court declared a mistrial.

The state decided to prosecute Kelley again. With Brower gone, the defense enlisted the assistance of a investigator in

---

[5] Of course, the court did not permit Brower to appear as an attorney. The court first requested that Schommer argue the motions. Schommer indicated that he was only local counsel and was not prepared to argue. Consequently, the court required Schommer to argue only the motions he could handle and then recessed the hearing until the following day, when Kunstler would be available, to consider the remaining motions.

[6] The record does not reveal the extent of Gombiner's participation, if any.

Edmund's office to do some additional work in preparation for the retrial.[7]

Kelley's second trial commenced on March 27. Again, Kunstler and Edmund shared the major responsibilities for Kelley's defense, but Edmund played a more significant role in the second proceeding. In particular, the task of cross-examining John Sweet now fell to Edmund. This important responsibility included impeaching Sweet's testimony about a conversation he had with Kelley years after the murder, in which Kelley allegedly told Sweet, "I stabbed [Maxcy] three or four times and he kept coming after us, so I had to shoot him in the head." Kelley v. State, 486 So. 2d 578, 580 (Fla. 1986). One of the State's other key witnesses was Abe Namia, a private investigator hired by Sweet's defense team when Sweet was being prosecuted. Namia's testimony corroborated Sweet's and was admitted to rebut the inference that Sweet recently fabricated his version of the story. Id.

At the conclusion of the State's case, the defense moved for judgment of acquittal. The court denied the motion. The defense then rested without introducing any evidence. This decision entitled the defense to make the first and last closing arguments to the jury.[8] When asked at the evidentiary hearing on Kelley's Rule 3.850 motion whether he considered the defense's decision to rest without putting on a case "to be a matter of trial strategy," Edmund responded, "Of course." He characterized the decision as a no-brainer in Kelley's case,

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[7] The investigator, Richard Mars, was a lawyer licensed to practice in Florida.

[8] At the time of Kelley's trial, Fla. R. Crim. P. 3.250 provided that "a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury." Customary practice under this rule is to have three arguments; the defendant opens and closes, and the prosecution is sandwiched in the middle.

and he suggested that any good defense lawyer would have adopted the same approach.

On March 30, the jury found Kelley guilty of first degree murder. At the end of the sentencing phase of the trial, a majority of the jury recommended that he receive the death penalty. On April 2, consistent with the jury's recommendation, the court sentenced Kelley to death.

3. Kelley's Direct Appeal

Kelley appealed his conviction and sentence to the Florida Supreme Court. Kunstler and Edmund appeared on Kelley's initial brief, which challenged several of the trial court's rulings. Specifically, Kelley contended that:

> (1) The court should have dismissed his indictment because the destruction of physical evidence after Sweet's second trial violated Kelley's due process rights.
>
> (2) The court should have excluded Abe Namia's testimony regarding a conversation between Namia and Sweet in 1967.
>
> (3) The court erred by refusing to answer a question posed the jury during its deliberations. In particular, the jury asked "if John J. Sweet received immunity in Florida for 1st Degree murder and perjury before he gave information on the Maxcy trial and if he had anything to gain by his testimony[.]"
>
> (4) The court erred in allowing the jurors to take notes.

(5) The court erred in admitting statements Kelley made to the FBI agents who apprehended him indicating Kelley's knowledge about the Maxcy murder at the time of his arrest.

(6) Florida's statute governing the proceedings for issuing death sentences is facially unconstitutional and, in any event, was improperly applied by the court.

In addition to the brief Kunstler and Edmund filed, the supreme court allowed Kelley to file a supplemental brief prepared by Barry Haight, a Massachusetts lawyer, and Donald Ferguson, a Florida lawyer.[9] Beyond the arguments advanced by Kunstler and Edmund, the supplemental brief asserted that the court gave improper, nonstandard jury instructions--in particular, an Allen charge[10] --which might have coerced the jury to overcome an impasse. Significantly, the supplemental brief also claimed that Kunstler and Edmund were ineffective and, therefore, deprived Kelley of his right to effective assistance of counsel under the Sixth Amendment. In support of this claim, the supplemental brief cited (1) counsels' failure to prepare pretrial motions properly; (2) counsels' failure to move the court to dismiss the indictment due to the State's destruction of evidence after Sweet's second trial; (3) Kunstler's failure to appear in Sebring on January 11 at the hearing the court had scheduled for Kelley's pretrial motions and his ostensible willingness to allow Brower to argue those motions; (4) counsels' failure to object to the court's Allen charge; and (5) counsels' failure to object to the court's refusal to answer the jury question described above.

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[9] From all we can tell, this was Haight and Ferguson's first appearance in the case.

[10] See Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

The supreme court rejected all of Kelley's arguments. Kelley, 486 So. 2d at 586. It also explained that Kelley's ineffective assistance claim could not be resolved on "the record as it stands." Id. at 585. That claim could be raised, however, in a collateral motion for postconviction relief. Id.

With the assistance of Alan Dershowitz, a Harvard Law School professor, Kelley petitioned the United States Supreme Court for a writ of certiorari. The Court denied the writ on October 6, 1986. Kelley v. Florida, 479 U.S. 871, 107 S. Ct. 244, 93 L. Ed. 2d 169.

4. Kelley's Rule 3.850 Motion and Appeal

In 1987, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure,[11] Kelley moved the trial court (the "Rule 3.850 court") to vacate his conviction and sentence. At this stage, Kelley was represented by Barry Wilson, a Boston lawyer, and James Green, who practiced in West Palm Beach. The motion alleged that the State had denied Kelley due process of law for the following reasons: (1) the State destroyed certain tangible exhibits introduced into evidence during Sweet's prosecution; (2) due to the destruction of these

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[11] The version of Rule 3.850 in effect during the collateral proceedings in this case provided, in relevant part:

> A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack, may move the court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence.

exhibits, defense counsel could not effectively cross-examine the State's expert witness who testified about them; (3) the prosecution illegally suppressed numerous items of exculpatory evidence; (4) the prosecution improperly interfered with defense counsel's cross-examination of Abe Namia; (5) the prosecutor's closing argument to the jury contained intentional misstatements of fact; and (6) Kunstler and Edmund deprived Kelley of effective assistance of counsel.[12]

The Rule 3.850 court held an evidentiary hearing on two issues: "1) whether the prosecution suppressed evidence favorable to the defendant [claim (3)], and 2) whether the defendant was denied effective assistance of counsel [claim (6)]." After receiving the parties' evidence, the court made written findings of fact and conclusions of law and denied Kelley's motion. The Florida Supreme Court, largely adopting those findings and conclusions, affirmed. Kelley v. State, 569 So. 2d 754, 762 (Fla. 1990). Responding to claim (1), the court found that "[t]he state was not at fault in the destruction of the evidence" and therefore did not deny Kelley of due process of law. Id. at 756. The court found that claims (4) and (5) were barred because they were not cognizable in a Rule 3.850 proceeding.[13] Id. Although the supreme court did not

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[12] This sixth claim is described in considerable detail in Part IV.A.2, infra, where we address the district court's issuance of the writ on a claim Kelley did not present to the Rule 3.850 court, to wit: that Kunstler and Edmund denied Kelley his Sixth Amendment right to effective assistance of counsel when they relied on Brower to conduct the pretrial investigation.

[13] The bases for claims (4) and (5) were contained in the record of the proceedings in Kelley's criminal prosecution; therefore, those claims should have been raised on direct appeal. Rule 3.850 permits collateral attack on a sentence and conviction. It is not a vehicle for relitigating claims that were cognizable on direct appeal--whether or not those claims were actually raised and decided on direct appeal.

say so in its opinion, the Rule 3.850 court correctly found claim (2) barred for a similar reason: "The admission of evidence and testimony at trial is clearly a matter which could have been raised on appeal."

In rejecting claims (3) and (6), the supreme court quoted the lower court's reasoning. Turning to claim (3), the court addressed all of the items the State had withheld from the defense and concluded that each was either legally immaterial or sufficiently available to defense counsel.

The court distilled Kelley's claim of ineffective assistance of counsel, claim (6), into seven discreet instances. The court responded to each, finding that every alleged instance of ineffective assistance was the result of trial strategy, was legally immaterial, or otherwise was not supported by the evidence presented at the Rule 3.850 hearing. The court concluded that both Kunstler and Edmund were "capable and effective" in their defense of Kelley. Id. at 761.

5. Kelleys' Motion for Habeas Corpus Relief from the Florida Supreme Court

Kelley's final attempt to seek relief in the state court system was a petition to the Florida Supreme Court for a writ of habeas corpus. In that petition, Kelley raised three claims: "(1) his appellate counsel [were] ineffective; (2) the application of the death penalty statute to this crime is ex post facto; and (3) the aggravating factors [supporting his death sentence] of pecuniary gain and cold calculated, and premeditated are overbroad." Kelley v. Dugger, 597 So. 2d 262, 263 (Fla. 1992) (emphasis added). On March 12, 1992, the court rejected each of these claims and denied Kelley's petition. Id. at 265.

II.

Federal Procedural History

A. Kelley's Federal Habeas Petition

On October 9, 1992, Kelley, represented by Laurence Tribe, a Harvard Law School professor, and Barry Wilson, petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus. See 28 U.S.C. § 2254. The petition, nearly 300 pages in length (not counting attached exhibits), asserted six bases for relief:

> (1) prosecutorial misconduct, including deliberate misstatements to the jury and the suppression of exculpatory evidence;
>
> (2) ineffective assistance of trial counsel, including "failure to investigate, to depose witnesses, to present a case in defense, and to perform other basic defense functions";
>
> (3) deprivation of Kelley's Sixth, Eighth, and Fourteenth Amendment rights through the destruction of evidence following John Sweet's second trial;
>
> (4) improper admission at trial of Abe Namia's testimony;
>
> (5) improper admission at trial of statements Kelley made to FBI Special Agent Ross Davis at the time of his arrest; and
>
> (6) unconstitutional imposition of the death sentence.

Kelley's petition contained a demand for an evidentiary hearing.

On August 31, 2000, the court issued an order denying claims (4), (5), and (6). The court concluded that those claims could be decided on the basis of the record of the proceedings in the trial stage of Kelley's prosecution. In the same order, the court deferred its decision on claims (1), (2), and (3) until it decided whether an evidentiary hearing on those claims was necessary. Kelley, No. 92-14246 at 29 (S.D. Fla. Aug. 31, 2000). On November 22, 2000, over eight years after Kelley filed his petition, the district court granted him an evidentiary hearing on the remaining claims over the State's repeated objections.

B. Kelley's Federal Evidentiary Hearing

The district court decided to hold an evidentiary hearing before it resolved three claims: (1) that the prosecution deprived Kelley of due process by suppressing exculpatory evidence; (2) that Kelley was prejudiced by ineffective assistance of counsel; and (3) that the destruction of evidence following Sweet's second trial deprived Kelley of due process of law. The hearing commenced on April 24, 2001. Attorneys James C. Lohman[14] of Tallahassee, Florida and Joseph Oteri of Boston, Massachusetts appeared on Kelley's behalf. Carol Dittmar appeared for the State. In total, Kelley's attorneys called eleven witnesses; the State called two.

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[14] Lohman came to represent Kelley after another series of attorney substitutions. On March 30, 1993, Barry Wilson filed a motion to withdraw from Kelley's case. The court entered an order substituting Donald Ferguson for Wilson on June 5. Unfortunately, Ferguson did not stay with Kelley throughout the habeas proceedings either. He filed his motion to withdraw on August 8, 1995. On August 29, the court granted that motion "to the extent that Mr. James C. Lohman will be substituted as counsel of record for Mr. Donald L. Ferguson."

The first two days of the hearing were held in Boston. Kelley presented the testimony of eight witnesses,[15] one of whom was co-counsel Joseph Oteri.[16] The third day of the

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[15] One of the witnesses testified via videotape.

[16] Oteri testified concerning a material issue: whether Harvey Brower's conduct operated to deny Kelley effective assistance of counsel. Oteri testified, in part, as follows:

> I wouldn't have entrusted Harvey [Brower] with 10 cents. He was totally incompetent as far as paying attention to details. He did absolutely nothing--he did the minimal amount of work he could do. And in this particular case, for Bill Kunstler, whom I had knew and had worked with, to entrust Harvey [Brower] with the preparation of a capital case is a mortal sin as well as incompetence.

After testifying to an issue on which the district court eventually granted habeas relief, Oteri participated in the evidentiary hearing as Kelley's co-counsel. Rule 3.7(a) of the Model Rule of Professional Conduct provides that

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

The record is silent as to whether Oteri, opposing counsel, or the district court were aware of this ethical provision. What we do know is that after testifying, Oteri did not withdraw from active participation in the habeas proceeding.

hearing was held on July 9 in Ft. Pierce, Florida. At that time, Kelley called three additional witnesses. The same day, the State called both of its witnesses, one being Edmund. Twelve of the thirteen individuals who testified at the evidentiary hearing had not testified at the Rule 3.850 hearing in state court. Only Edmund testified at both hearings.

C. Disposition of Kelley's Federal Habeas Petition and Subsequent Developments

On September 19, 2002, the court issued an order granting Kelley relief on claim (1). Based in part on testimony adduced at the evidentiary hearing, the court concluded that Kelley was entitled to a new trial because the State had withheld material exculpatory evidence in derogation of the rule laid down in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Kelley, 222 F. Supp. 2d 1357 (S.D. Fla. Sept. 19, 2002). Having granted Kelly relief on this claim, the court apparently thought it unnecessary to rule on Kelley's two remaining claims, (2) and (3). Acting pursuant to the September 19 order, the clerk entered a final judgment and closed the case the same day.

On September 30, 2002, the State filed a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.[17] The State supported its motion

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[17] In relevant part, Rule 59 provides,

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. . . .

with two arguments. First, citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992), the State argued that the district court should have ruled on claims (2) and (3) as well as claim (1). Second, the State argued that the court should revise its disposition of claim (1) to correct clear error and prevent manifest injustice. In the State's view, the court reached its decision only by disregarding important testimony and failing to give due deference to the findings of the state courts.

The district court disposed of the State's motion in an order issued on December 30, 2002. Kelley, 238 F. Supp. 2d 1325 (S.D. Fla. 2002). Answering the State's second argument first, the court declined to alter or amend its judgment on claim (1). The court agreed with the State, however, that it should have ruled on the two undecided claims.

Turning to claim (2), the court found that Kelley was entitled to habeas relief because his trial counsel was ineffective. The court reasoned that Kelley's defense counsel had "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary[,]" but had met neither obligation. Id. at 1329 (citing Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984)). In the court's view, Harvey Brower, who was responsible for pretrial investigation, was incompetent, and Kelley's primary defense counsel, Kunstler and Edmund, did not know that Brower had failed them. As the court stated in its order,

> Kelley's trial counsel was deficient in having a disbarred attorney, lazy to a fault, resolve whether or not to conduct a pretrial investigation.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

> . . . [T]rial counsel in the present case acted under the mistaken belief that Brower would perform a dutiful investigation or decide not to investigate after thoughtful consideration.

Id. at 1329. After finding that counsel's performance fell short of the Sixth Amendment's standard for effective assistance of counsel, the court neglected to say how, if at all, counsel's ineffectiveness prejudiced Kelley. The court also failed to mention the other instances of ineffective assistance of counsel that Kelley asserted in his petition.

The court found no merit in claim (3) because Kelley failed to show that the State had acted in bad faith when it destroyed the exhibits introduced into evidence during Sweet's prosecution.

On January 28, 2003, the State initiated the appeal now before us. The appeal calls into question the correctness of the orders the district court entered on September 19, 2002 (granting habeas relief on claim (1)) and December 30, 2002 (granting relief on claim (2)).[18] Kelley does not cross-appeal the district court's denial of claims (3), (4), (5), and (6) or its partial denial of claim (2).

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

III.

Federal Evidentiary Hearing

Before proceeding to the merits of the district court's rulings, we first address the question of whether the court abused its discretion in granting Kelley an evidentiary hearing so that he could present evidence to it that was not presented to the state courts. We review a district court's decision to

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[18] The State did not appeal the district court's partial denial of its Rule 59(e) motion to alter or amend its September 19 judgment.

grant or deny an evidentiary hearing for abuse of discretion. See Hall v. Head, 310 F.3d 683, 690 (11th Cir. 2002); cf. Mathis v. Zant, 975 F.2d 1493, 1497 (11th Cir. 1992) (vacating grant of habeas relief and remanding for cause-and-prejudice hearing where the district court, without identifying its authority to do so and despite respondent's objections, permitted petitioner to develop evidence never presented to the state court). A district court abuses its discretion if it misapplies the law or makes findings of fact that are clearly erroneous. Ambrosia Coal and Constr. Co. v. Morales, 368 F.3d 1320, 1332, 95 Fed. Appx. 1320 (11th Cir. 2004) (citations omitted).

A. Legal Standard for Permitting a Federal Evidentiary Hearings

The legal standard for determining the scope of a district court's discretion to hold an evidentiary hearing in a habeas corpus case depends on whether the case is subject to the Antiterrorism and Effect Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Where AEDPA applies, the standard is articulated in 28 U.S.C. § 2254(e)(2). In pre-AEDPA cases, the standard was first set forth in Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), and clarified in subsequent decisions, including most prominently Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d. 318 (1992).

Beginning with pre-AEDPA cases, the Supreme Court held in Townsend that district courts are required to grant evidentiary hearings to state prisoners when any of the following six circumstances applies:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual

> determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313, 83 S. Ct. at 757. The Court emphasized that these six circumstances merely enumerated the cases in which an evidentiary hearings is mandatory. The circumstances in which an evidentiary hearing is authorized were considerably broader. Indeed, the Court indicated that district judges have "discretion" to hold evidentiary hearings in "all" cases, even where the petitioner "was afforded a full and fair hearing by the state court resulting in reliable findings . . . ." Id. at 318, 83 S. Ct. at 760. The Court elaborated,

> In every case [the district judge] has the power, constrained only by his sound discretion, to receive evidence bearing up the applicant's constitutional claim. There is every reason to be confident that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion.

Id.

Three years after the Townsend decision came down, Congress amended the habeas statute. Among these

amendments, Congress established a statutory presumption according deference to state-court factfindings except under eight enumerated exceptions, which roughly paralleled Townsend's tests for determining when district courts must grant an evidentiary hearing.[19] Where none of these

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[19] The relevant statute, which has since been comprehensively amended, then provided as follows:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the appellant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

exceptions applied, the amended statute increased the burden petitioners had to meet to override state factfindings. Where state factfindings were presumed correct, the petitioner had to establish the state court's error by "convincing evidence"; where state factfindings were not presumed correct (because one of the statute's exceptions applied), the petitioner had to

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(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d), subsequently amended by Antiterrorism and Effect Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

establish the facts necessary to support his claim by only a preponderance of the evidence. Keeney, 504 U.S. at 20, 112 S. Ct. at 1726 (O'Connor, J., dissenting) (quoting Sumner v. Mata, 449 U.S. 539, 551, 101 S. Ct. 764, 771, 66 L. Ed. 2d 722 (1981)). Thus, although district courts still could, within the limits of their "sound discretion," Townsend, 372 U.S. at 318, 83 S. Ct. at 760, grant evidentiary hearings when Townsend's tests were not met, they could not overlook the elevated deference accorded state factfindings unless an exception to the revised statute applied.

In 1992, the Supreme Court revisited the issue of federal evidentiary hearings and overruled Townsend in part. In Keeney, the Court reconsidered the fifth circumstance in which Townsend entitled a petitioner to an evidentiary hearing, namely, when material facts were not adequately developed in the state courts. The Court held that a habeas petitioner is "entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure." Keeney, 504 U.S. at 11, 112 S. Ct. at 1721 (emphasis added). Alternatively, the petitioner is permitted to develop additional facts at the federal level if he could "show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Id. at 12, 112 S. Ct. at 1721. The Supreme Court explained that this rule limiting the availability of federal evidentiary hearings was motivated not only by considerations of judicial economy, but also by those of comity to state courts, accuracy and finality of state court judgments, and consistency in habeas corpus jurisprudence. Id. at 8-9, 112 S. Ct. at 1719-20.

A majority of the Court did not specify whether Keeney's revision of the law defined the conditions in which federal evidentiary hearings were mandatory or, rather, the outer boundaries of when they were permissible. But see id. at 23, 112 S. Ct. at 1727 (O'Connor, J., dissenting) ("[T]he district courts . . . still possess the discretion, which has not been

removed by today's opinion, to hold [evidentiary] hearings even where they are not mandatory."). We confronted that issue, however, in Mathis v. Zant, 975 F.2d 1493 (11th Cir. 1992). There, "the district court, on its own initiative, permitted [the] petitioner to introduce additional evidence to bolster his claim of ineffective assistance of counsel at sentencing by developing and submitting evidence never presented to the state court that first addressed this claim." Id. at 1497. After considering the newly developed evidence, the court granted relief on the ineffective assistance ground.[20] Id. We observed that, despite the respondent's numerous objections, the district court never identified its authority for holding an evidentiary hearing on its own initiative. Id. Consequently, we vacated the district court's judgment and remanded, instructing the court

> (1) to articulate its ground or grounds for circumventing the presumption of correctness accorded a state court's factual findings under [pre-AEDPA] 28 U.S.C. § 2254(d) by sua sponte permitting petitioner to submit additional evidence on his claim of ineffective assistance of counsel at sentencing, [and] (2) to determine whether petitioner can demonstrate cause and prejudice for failing to present to the state courts the supplemental evidence submitted to the district court . . . .

Id. (citing Keeney, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S. Ct. 1715).

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[20] It also granted relief on other grounds, but they are of no consequence here.

Arguably, this holding could be narrowly read to require satisfaction of Keeney's cause-and-prejudice test only where a district court elects to hold an evidentiary hearing absent motion of the petitioner. But we later resolved any doubt as to the necessity of applying Keeney's test to all cases in Weeks v. Jones, 26 F.3d 1030, 1043 (11th Cir. 1994). There we held unequivocally, "Without a cause and prejudice showing for evidence not submitted to the state court, a habeas petitioner is procedurally barred on federal habeas review just as he is from presenting new claims not previously before the state court." Id. at 1043; see also Mitchell v. Rees, 114 F.3d 571, 577 (6th Cir. 1997) (holding that under pre-AEDPA law "a district court abuses its discretion by ordering [an evidentiary] hearing without first requiring the petitioner to make the requisite showing [of cause and prejudice]"). But see Seidel v. Merkle, 146 F.3d 750, 754 (9th Cir. 1998) (holding that Keeney did not limit the discretion of a district court to hold an evidentiary hearing that is not required by Townsend); Clemmons v. Delo, 124 F.3d 944, 951 (8th Cir. 1997) ("Keeney . . . addresses only the circumstances under which an evidentiary hearing is required."); Pagan v. Keane, 984 F.2d 61, 64 (2d Cir. 1993) (holding that, after Keeney, district courts retain the power to hold evidentiary hearings even though one is not required). Thus, it was settled in this circuit that, after Keeney and before AEDPA, district courts lacked discretion to grant evidentiary hearings to develop facts that a habeas petitioner had failed to develop in state court, unless the petitioner established cause and prejudice or a miscarriage of justice.

The test AEDPA established in 1996 is even more deferential to state courts than the earlier standard:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an

> evidentiary hearing on the claim unless the applicant shows that--
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> (A) the claim relies on--
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> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added). Note that, like the Keeney test, the current § 2254(e)(2) is specific to those situations in which an evidentiary hearing is requested to develop facts that the petitioner failed to develop in state court. Note further that AEDPA expressly limits the extent to which hearings are permissible, not merely the extent to which they are required.

B. Application of the Legal Standard to Kelley's Case

Kelley requested an evidentiary hearing in his petition for habeas corpus relief and renewed his request several times thereafter. For example, after AEDPA's enactment in 1996, the court asked the parties to file memoranda briefing AEDPA's effects on the ongoing proceeding. Kelley's memorandum argued that AEDPA's amendments to § 2254,

and § 2254(e) in particular, do not apply to this case, and it urged the court to honor Kelley's previous demand for a hearing. The State took the opposite position and specifically noted that the amended § 2254(e) limits the availability federal evidentiary hearings.

On April 23, 1997, Kelley, acting under the impression that the court had ordered an evidentiary hearing "for some time during the period of May 12 to May 23, 1997," moved the court for leave to issue subpoenas requiring several witnesses to appear at the federal government's expense to testify in support of his claims.[21] The State filed a response on

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[21] Kelley styled his motion as a Motion for Issuance of Witness Subpoenas and Award of Witness Fees and Expenses Without Cost to Petitioner. As authority for his motion, he cited Fed. R. Crim. P. 45(a)-(b), "Computing and Extending Time," and 21 U.S.C. § 848(q), "Appeal in capital cases; counsel for financially unable defendants." Section 848 was plainly inapplicable. The section applies to cases in which the death penalty is imposed under § 848; Kelley's was imposed under Florida law. Because the rule of criminal procedure he cited was also inapplicable, we assume that Kelley meant to cite Rule 45(c)(3)(B) of the Federal Rules of Civil Procedure, "Protection of Persons Subject to Subpoenas." That section states:

> If a subpoena . . . requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial . . . the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony . . . that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance . . . only upon specified conditions.

Fed. R. Civ. P. 45(c)(3)(B)(iii).

April 30, contending that a hearing should not be held.[22] The State protested that Kelley had not shown "(1) cause for, and prejudice from, the failure to develop such facts, or (2) that a federal evidentiary hearing is necessary to prevent a fundamental miscarriage of justice."

On May 27, 1997, Kelley filed a pretrial memorandum outlining several avenues along which he hoped to develop additional facts to support his claims. Ultimately, the memorandum asked the court to convene a hearing to receive Kelley's new evidence. In the alternative, Kelley asked for a hearing to argue that the court could receive that evidence because he had cause for his failure to present it to the state courts and resulting prejudice.

On August 26, 1997, the court heard argument of counsel on the question of whether to hold an evidentiary hearing. At a status conference held on December 15, 1998, the court indicated its inclination to hold an evidentiary hearing in both Ft. Pierce and Boston, where it could receive the testimony of witnesses located in that vicinity and alleviate concerns about the cost of transporting many of Kelley's witnesses. The State protested again:

The State objected to Kelley's motion because the motion neither demonstrated "a substantial need for the testimony" of the witnesses sought to be subpoenaed nor represented that the witnesses would "be reasonably compensated." As noted in the text, the State also objected on the ground that an evidentiary hearing was not permitted.

[22] Kelley amended his Motion for Issuance of Witness Subpoenas and Award of Witness Fees and Expenses Without Cost to Petitioner on September 14, 1998, and the State responded with the same challenges.

MS. DITTMAR:[23] [Y]our Honor, I feel like I need to reiterate the respondent's position that there just is no reason--

THE COURT: I know what your position is; that you don't think it necessary.

MS. DITTMAR: That is correct, your Honor.

THE COURT: I feel under all of the circumstances that the better course is to have the hearing.

MS. DITTMAR: Your Honor, I am not sure what circumstances those are. I am not aware of any capital case in Florida where there has been a federal evidentiary hearing after there has been a full and fair hearing in State Court. And I just don't understand the legal basis for having any of these witnesses give testimony at this point.

THE COURT: Well, that is not the kind of new ground I would like to break. And I promise you I will review it one more time before I take any, set the wheels in motion with the Administrative Office.[24]

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[23] Carol M. Dittmar appeared on behalf of the State. This transcript excerpt has been edited to correct the spelling of her surname.

[24] The court apparently felt it necessary to obtain the approval of the Administrative Office of the United States Courts to hold an evidentiary hearing in Boston at government expense.

The court deferred its final ruling on the evidentiary hearing issue until November 22, 2000, when in a telephone conference with counsel, it resolved to hold a hearing on Kelley's remaining habeas claims. The State emphasized that it had "a continuing objection to holding the hearing at all." Over that objection, the court decided that the hearing would begin the next spring in Boston.

The State persisted in its opposition to the hearing. On December 11, 2000, for instance, the State once again objected to having a hearing; alternatively, it moved the court to limit the scope of the hearing, contending that it should be limited only to Kelley's claims of ineffective assistance of counsel during the penalty phase of Kelley's trial.

On December 29, 2000, the court entered an order scheduling the evidentiary hearing to commence in Boston on April 24, 2001.

On March 21, 2001, the state filed written objections to Kelley's list of proposed witnesses. Once again, it reiterated its opposition to the course the court was taking:

> Petitioner has failed to demonstrate any cause or prejudice for his failure to present these witnesses at his state court postconviction evidentiary hearing. Absent such cause and prejudice, this additional evidence should not be presented. . . . Since the Petitioner has not offered any justification for his failure to present this evidence when he was granted the opportunity to do so in state court, he is precluded from offering it at his federal evidentiary hearing.

The court did not address the State's December 11, 2000 motion to limit the scope of the evidentiary hearing until March 18, 2002. Because the hearing had already been held at that point and, indeed, had concluded almost a year earlier, the court denied the State's motion as moot.

In our view, the district court abused its discretion in granting the evidentiary hearing. First, the court failed to determine the appropriate legal standard for measuring its discretion to grant the hearing. Second, despite the State's continuous objections to the hearing, the court failed to acknowledge and apply any legal constraint on its discretion at all. We elaborate on these points below.

1. The District Court's Failure to Ascertain the Appropriate Legal Standard

Determining the test to be applied in this case--AEDPA's or the pre-AEDPA standard--is a difficult question that cannot be resolved on this record. The district court and the litigants uncritically agreed that the pre-AEDPA cause-and-prejudice test applied. Although it is true that Kelley filed his habeas petition prior to AEDPA's enactment, the possibility of retroactive application complicates our analysis.

The Supreme Court addressed the extent of AEDPA's retroactive application in Lindh v. Murphy, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The Court noted that AEDPA amended portions of Title 28, Chapter 153 of the United States Code, which involves habeas corpus proceedings generally. Section 2254(e)(2), which contains the updated limitations on federal evidentiary hearings, was among the amended provisions in that chapter.[25] AEDPA also

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[25] As the Court explained, AEDPA eliminated what was formerly § 2254(d) and moved what was once subsection (e) to subsection (f). Lindh, 521 U.S. at 332, 117 S. Ct. 2066.

> [I]n place of the old (d), it inserted a new (d) followed by a new (e), the two of them dealing with, among other things, the adequacy of state factual determinations as bearing on a right to federal relief, and the presumption of correctness to be given such state determination.

Id.

"creates an entirely new chapter 154, with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings." Id. at 327, 117 S. Ct. at 2063. AEDPA specifically provided that chapter 154, which pertains only to capital cases, "shall apply to cases pending on or after the date of enactment of this Act." AEDPA § 107(c), 110 Stat. at 1221 (codified as note to 28 U.S.C. § 2261). Because the statute contained no similar indication about the reach of the amendments to chapter 153, the Supreme Court concluded that AEDPA's text fairly implies "that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." Lindh, 521 U.S. at 336, 117 S. Ct. at 2068.

Although AEDPA's pertinent provision, § 2254(e)(2), is contained in nonretroactive chapter 153, its restrictions might still apply to Kelley through chapter 154, which is retroactive and at least potentially applicable. Importantly, chapter 154 incorporates parts of chapter 153 by reference; it expressly provides, for instance, that district courts must rule on the claims before them "subject to subsections (a), (d), and (e) of section 2254[.]" 28 U.S.C. § 2264(b) (emphasis added). The Supreme Court noted that where retroactive chapter 154 applies and incorporates parts of chapter 153 by reference, it renders those portions of AEDPA retroactive for its limited purposes. As the Court explained, "[W]hen a pending case is also an expedited capital case subject to chapter 154, the new provisions of § § 2254(d) and (e) will apply to that case[,]" even though those sections are nonretroactive without the help of chapter 154. Lindh, 521 U.S. at 335, 117 S. Ct. at 2067; see also id. at 326, 117 S. Ct. at 2063 ("The statute reveals Congress's intent to apply the amendments to chapter 153 only to such cases as were filed after the statute's enactment (except where chapter 154 otherwise makes select provisions of chapter 153 applicable to pending cases) (emphasis added)).

Kelley's habeas petition was pending when AEDPA became effective; thus, AEDPA's restrictions on federal evidentiary hearings probably extend to his case if chapter 154 applies and makes them retroactive. This conclusion, of course, begs another challenging question: Is chapter 154 applicable? At the broadest level, the chapter, entitled "Special Habeas Corpus Procedures in Capital Cases," applies only to "cases arising under section 2254, brought by prisoners in State custody who are subject to a capital sentence." 28 U.S.C. § 2261(a). Without question, Kelley, unlike the petitioner in the Lindh case, is subject to a capital sentence. More particularly, chapter 154 only applies if the state that sentenced the petitioner meets the criteria of § § 2261(b) and (c), which involve the appointment and compensation of competent postconviction counsel for the petitioner. At this time, it is not clear whether the state of Florida had satisfied those criteria.[26]

Here, the district court naively assumed that pre-AEDPA law applied. The court reasoned, "[E]xcept for select provisions that Congress explicitly made retroactive,

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[26] We addressed this issue once in Hill v. Butterworth, 133 F.3d 783 (11th Cir. 1997), vacated by 147 F.3d 1333, 1334 (11th Cir. 1998). The district court in that case determined that Florida did not satisfy all of the requirements necessary to invoke chapter 154. Id. at 784-85 (quoting Hill v. Butterworth, 170 F.R.D. 509, 524 (N.D. Fla. 1997)). Noting that, since the case left the district court, Florida's laws changed in ways that might have affected the applicability of chapter 154, we remanded the case for further proceedings. Id. at 786. Soon thereafter, though, the Supreme Court decided Calderon v. Ashmus, 523 U.S. 740, 118 S. Ct. 1694, 140 L. Ed. 2d 970 (1998), which demonstrated that the Butterworth case was nonjusticiable and rendered chapter 154's applicability moot. Consequently, on the State's petition for rehearing, we vacated our previous decision and remanded the case to the district court with instructions to dismiss the case. 147 F.3d 1333, 1334 (11th Cir. 1998). To the best of our knowledge, the issue of chapter 154's applicability to Florida cases remains unresolved.

[AEDPA's] amendments apply only to cases filed after the effective date of the amended statute." Kelley, 222 F. Supp. 2d 1357, 1361 (S.D. Fla. 2002). It concluded, "As Kelley's petition was filed in 1992, and does concern the select retroactive provisions, this court must apply the law as it was prior to the 1996 amendments." Id. The court did not explain why the retroactive provisions of chapter 154 did not concern Kelley's petition. Indeed, it is apparent that the court never considered the possibility that chapter 154 made AEDPA's other provisions retroactive such that they might control the standard for granting an evidentiary hearing in this case.

This issue was not briefed to us, however, and the record lends no insight sufficient to permit us to decide whether chapter 154 extends to Florida such that AEDPA's restrictions on evidentiary hearings should have applied in this case.

2. The District Court's Failure to Apply Any Legal Standard

In any event, the district court clearly abused its discretion by authorizing the hearing. The court compounded its failure to determine the applicable legal standard by neglecting to apply any standard at all.

If AEDPA applied, the court could not have afforded Kelley an evidentiary hearing. The record was, and is, devoid of any indication that Kelley's claims rely either on "new rule of constitutional law, made retroactive to cases on collateral review" or on "a factual predicate that could not have been previously discovered through the exercise of due diligence . . . ." 28 U.S.C. § 2254(e)(2)(A). Although it is the nature of Brady claims that the prosecution precludes the defense from obtaining important evidence before trial, we observe no indication that Rule 3.850 counsel were precluded from developing the factual basis for any of Kelley's collateral claims through the exercise of due diligence during the Rule

3.850 proceedings.[27] Nor do we perceive the remo possibility that the facts supporting the three claims for whic the evidentiary hearing was granted "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [Kelley] guilty of [murder]." 28 U.S.C. § 2254(e)(2)(B).

Even if the district court were correct in its hasty assumption that pre-AEDPA law governed its decision, the court abused its discretion by neglecting to apply the pre-AEDPA test properly.

Kelley, who also assumed that pre-AEDPA law applied, advanced, as he does here, several explanations for why he was entitled to an evidentiary hearing under Townsend. None have merit. He argues that the Rule 3.850 court's factual determinations cannot be presumed correct because the court failed to address "crucial allegations and matter in dispute" and because it made "findings that were clearly unsupported by the record." We cannot agree. In the Rule 3.850 court, Kelley's attorneys placed twenty-six exhibits in evidence and presented the testimony of ten witnesses in support of the Kelley's claims for relief. The court systematically analyzed each of Kelley's claims in a thorough opinion that was ultimately given great deference by the Florida Supreme Court. After reviewing the record of the Rule 3.850 proceedings, we conclude that the court's findings are fairly supported.

Thus, Kelley's only basis for obtaining a federal evidentiary hearing must be that he failed to develop material facts adequately in the Rule 3.850 court. As explained above, the district court had discretion to allow a hearing before

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[27] By the time of the Rule 3.850 proceedings, Kelley had obtained all of the items upon which the Brady claims in his federal habeas petition are based.

AEDPA took effect only if Kelley could satisfy Keeney's test of cause and prejudice or miscarriage of justice. The court erroneously neglected to apply this standard. Indeed, although the court voiced its view that the hearing was necessary, the record is barren of any indication as to why it concluded that a hearing was permissible.

Because it failed properly to apply Keeney and our subsequent precedent, the district court has deprived us of a record basis for deciding whether Kelley established cause and resulting prejudice for his failure to develop the factual bases for his claims in the Rule 3.850 court. In oral argument in this appeal, Kelley's attorney agreed that the district court failed to make findings of cause and prejudice. In fact, he contended that this court could not make a cause-and-prejudice determination on the record as its stands, and that if we conclude that the district court erred in granting Kelley an evidentiary hearing, we should remand the case to the district court to permit Kelley to show the cause and prejudice that warranted the district court's decision to hold an evidentiary hearing.

Even so, we observe from what is before us that Kelley would have faced great difficulties in satisfying Keeney's test. To show cause, Kelley had to prove that some impediment external to the decisions of his Rule 3.850 counsel prevented him from first presenting to the state court the evidence he introduced in the hearing in the district court. See Murray v. Carrier, 477 U.S. 478, 492, 106 S. Ct. 2639, 2648, 91 L. Ed. 2d 397 (1986). Three of the eleven witnesses Kelley called to the stand before the district court testified to events that occurred in Kelley's presence. If Kelley now hangs his "cause" hat on Brower's insufficient pretrial investigation, we are baffled as to why Kelley required an investigator at all to discover these witnesses. Furthermore, the record reveals no hint that Kelley was incapable of fully developing his collateral claims in the Rule 3.850 court. Kelley's failure to present evidence to that court must not be confused with his

inability to develop certain evidence at the second trial. For example, although prosecutorial misconduct might have created cause for defense counsel's failure to present certain evidence at trial, the record before us yields no indication that similar misconduct impeded counsel from presenting to the Rule 3.850 court the evidence they introduced (for the first time) at the federal hearing. By the same token, although trial records rarely reflect a complete account of an attorney's ineffectiveness, there is no apparent reason why Kelley should not have known the extent of trial counsel's shortcomings by the time he filed his Rule 3.850 motion for collateral relief.

Kelley would also be hard-pressed to demonstrate any prejudice for failing to develop the new evidence that was not properly presented to the state court. If Kelley was prejudiced by such failure, it must be because he either (1) would have prevailed on a claim he asserted had he introduced the new evidence with it, or (2) would have prevailed on a claim he never asserted at all.

Kelley cannot establish the latter circumstance. To raise an unexhausted claim for the first time in a federal habeas corpus proceeding, the petitioner must first establish cause and prejudice or miscarriage of justice for failing to exhaust the claim in state court. See, e.g., Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999) (citations omitted). This is a one-time requirement. If the petitioner meets it successfully, he can go forward and develop the claim's factual basis; if he does not, the claim is barred and the issue of factual development is moot. As we explain below, the district court improperly granted Kelley relief on an unexhausted instance of his ineffective assistance of counsel claim. See supra Part IV.A. Because that instance of Kelley's claim was not presented to the state courts, its was procedurally defaulted. Kelley obviously could not have been prejudiced in the district court by his failure to develop evidence in the Rule 3.850 court for a claim he can no longer raise.

Kelley would also have difficulty establishing prejudice from Rule 3.850 counsel's failure to present the new evidence supporting the claims he did exhaust. The district court correctly denied claims (4), (5), and (6) as a legal matter. Kelley, No. 92-14246 at 29 (S.D. Fla. Aug. 31, 2000). Additional evidence could not have enhanced these claims. The court rejected claim (3) on the ground that the State did not deny Kelley due process by destroying certain evidence after Sweet's second trial because the State had not done so in bad faith. Kelley, 238 F. Supp. 2d 1325 (S.D. Fla. 2002). Kelley's new evidence had nothing whatsoever to do with the State's intentions surrounding the destruction of the evidence. Thus, that evidence could not have enhanced that claim. Furthermore, for reasons we discuss below, see infra Part IV.B, Kelley's Brady claims fail for lack of legal materiality. No amount of additional evidence can revive a claim that is legally insufficient.

That leaves us with Kelley's ineffective assistance claims. The evidence Kelley presented to the district court shed little light on the instances of his ineffective assistance claim that had been exhausted and, therefore, were preserved for federal review. Most of the new evidence appears relevant primarily to the procedurally barred claim that Kelley's conviction might not have resulted had defense counsel not relied on Brower to conduct the pretrial investigation. Even if the claim were not barred, we have serious doubt that new evidence of Brower's incompetence justified the granting of habeas relief.[28] After all, Kelley's counsel had well over a month after Brower's disappearance to conduct further research for Kelley's second trial if such research were necessary. Furthermore, Kelley's counsel testified that their decision to

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[28] Indeed, that Kelley told the district court that he needed an evidentiary hearing to develop this instance of his ineffective assistance claim underscores the fact that he did not raise the claim in his Rule 3.850 proceeding.

rest without putting on a defense was a matter of calculated trial strategy. See infra note 34.

All of this said, we need not remand the case, as we did in Mathis, 975 F.2d at 1497, to enable the petitioner to show cause and resulting prejudice for his failure to present his new evidence to the Rule 3.850 court. As we explain in Part IV, Kelley would not qualify for habeas relief as a matter of law even if the additional evidence were admitted and properly weighed.

IV.

Rulings on Habeas Claims

Having decided that the district court abused its discretion by granting the evidentiary hearing without applying the proper legal standard, we turn to the relief it granted. The court granted habeas relief on claim (1) for five Brady violations, and claim (2) for ineffective assistance of trial counsel. We address these rulings in reverse order. As indicated supra, neither claim has merit with or without the evidence Kelley presented to the district court.

A. Ineffective Assistance of Counsel

The district court granted Kelley habeas relief for ineffective assistance on the ground that "Kelley's trial counsel was deficient in having a disbarred attorney, lazy to a fault, resolve whether or not to conduct a pretrial investigation." Kelley, 238 F. Supp. 2d 1325, 1329 (S.D. Fla. 2002). Kelley defaulted this claim by failing to present it to the Rule 3.850 court. Therefore, the district court should have dismissed it. Even if the claim were preserved, however, it should have failed.

1. The Exhaustion Requirement

Habeas petitioners generally cannot raise claims in federal court that were not first exhausted in state court. See, e.g.,

Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998). To properly exhaust a claim, "the petitioner must afford the State a full and fair opportunity to address and resolve the claim on the merits." Keeney, 504 U.S. at 10, 112 S. Ct. at 1720. It is not sufficient merely that the federal habeas petitioner has been through the state courts, Picard v. Connor, 404 U.S. 270, 275-76, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438 (1971), nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made, Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277, 74 L. Ed. 2d 3 (1982) (citations omitted). The petitioner must present his claims to the state courts such that they are permitted the "opportunity to apply controlling legal principles to the facts bearing upon (his) constitutional claim." Picard, 404 U.S. at 277, 112 S. Ct. at 513 (alteration in original).

Thus, the prohibition against raising nonexhausted claims in federal court extends not only to broad legal theories of relief, but also to the specific assertions of fact that might support relief. For example, habeas petitioners may not present particular factual instances of ineffective assistance of counsel in their federal petitions that were not first presented to the state courts. Footman v. Singletary, 978 F.2d 1207, 1211 (11th Cir. 1992). As we explained,

> allowing a habeas petitioner to allege a single instance of ineffective assistance in his state post-conviction proceedings and then proceed to federal court to allege additional instances would be contrary to the state's "full and fair opportunity to address the claim on the merits." The state would never have the benefit of evaluating the claim using a fully developed set of facts. This would not be the "serious and

meaningful" exhaustion of claims that Congress intended.

Id.; see also Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (holding that, where the habeas petitioner properly raised only one ineffective assistance claim on collateral attack in state court, he could seek federal relief based on that specific claim, but not based on other alleged attorney defects that were not presented to the state courts); Maynard v. Lockhart, 981 F.2d 981, 984-85 & n.1 (8th Cir. 1992) ("To preserve an allegation of ineffective assistance for federal habeas review, a petitioner must present that specific allegation to a state court."). Furthermore, habeas petitioners cannot preserve otherwise unexhausted, specific claims of ineffective assistance merely by arguing that their lawyers were ineffective in a general and unspecified way. See Weeks, 26 F.3d at 1044-46 (rejecting petitioner's argument that "the general claim of ineffective assistance in state court preserves for federal review all alleged instances of ineffectiveness, regardless of whether evidence of a particular act was presented to the state court"). In sum, to preserve a claim of ineffective assistance of counsel for federal review, the habeas petitioner must assert this theory of relief and transparently present the state courts with the specific acts or omissions of his lawyers that resulted in prejudice.

Federal habeas petitioners are undoubtedly on their strongest footing with regard to the exhaustion requirement when their federal claims are carbon copies of the claims they presented to the state courts. Such reproduction leaves no question that the claims presented to the federal court are the same as those that were presented to the state court. But we do not demand exact replicas. We recognize that habeas petitioners are permitted to clarify the arguments presented to

the state courts on federal collateral review provided that those arguments remain unchanged in substance.

We are not so draconian or formalistic as to require petitioners to give a separate federal law heading to each of the claims they raise in state court to ensure exhaustion for federal review. We simply require that petitioners present their claims to the state courts such that the reasonable reader would understand each claim's particular legal basis and specific factual foundation. See Picard, 404 U.S. at 277, 112 S. Ct. at 513. As the First Circuit observed,

> [T]he exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick.

Martens v. Shannon, 836 F.2d 715, 717 (1st Cir. 1988).

To ensure exhaustion, petitioners must present their claims in this manner of clarity throughout "one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1 (1999). As long as state supreme court review of a prisoner's claims is part of a state's ordinary appellate review procedure, prisoners of that state must present their claims to the state supreme court to preserve those claims for federal review, even if review by that court is discretionary. See id. at 848-49, 119 S. Ct. at 1734.

The habeas petitioner can escape the exhaustion requirement only by showing cause for the default and actual prejudice resulting therefrom, or by establishing a

fundamental miscarriage of justice. Bailey, 172 F.3d at 1306 (citing Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); Schlup v. Delo, 513 U.S. 298, 324-27, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). Absent the applicability of these exceptions, nonexhausted claims cannot be raised in federal habeas corpus petitions.

We review a district court's determination as to whether a habeas petitioner is procedurally barred from raising a claim in federal court de novo. Lusk v. Singletary, 112 F.3d 1103, 1105 (11th Cir. 1997).

2. Application of the Exhaustion Requirement to Kelley's Case

Kelley's Rule 3.850 motion cited seven specific instances of ineffective assistance of counsel. First, the motion contended that Kelley's trial counsel, Kunstler and Edmund, were ineffective because "they failed to thoroughly review" certain materials obtained by Rule 3.850 counsel that could have been used "to determine the full extent of the evidence destroyed in 1976," after John Sweet's second trial.

Second, the motion argued that Kunstler and Edmund were ineffective because they failed to object to the expert testimony of three of the State's expert witnesses and stipulated to the testimony of a fourth expert. These witnesses testified about the destroyed evidence, and Kelley's Rule 3.850 counsel reasoned that they could not be cross-examined effectively because that evidence was not in existence at the time of Kelley's trial.

Kelley's third theory of ineffective assistance contained a hodgepodge of grievances, all of which fell under the banner of "Failure to Develop Defense Theories." The gravamen of this claim was that Kunstler and Edmund made a series of missteps that undermined the defense's two key theories: first, that the person who registered at the Daytona Inn Motel around the time of the murder, although using Kelley's name, was not actually defendant William Kelley; and second, that

John Sweet executed the murder himself without the assistance of hired assassins. Kelley's Rule 3.850 counsel argued that his trial counsel should have more adroitly resisted the State's effort to link Kelley to the motel. Along these lines, the Rule 3.850 motion specifically faulted Kelley's trial counsel for failing "to adduce evidence that the handwriting on the motel's registration record was not the defendant William Kelley's handwriting, a fact that the defendant had made known to defense counsel." It faults trial counsel for stipulating that the car registered at the motel belonged to Jennie Adams, who had been seen with Kelley from time to time and was his girlfriend. Additionally, the motion contended that trial counsel should have attempted to show that descriptions of the women who accompanied the man registered under Kelley's name at the motel did not match the appearance of Jennie Adams.

In this same section, the motion asserts that Edmund performed deficiently in his cross-examination of Kaye Carter, the daughter of a clerk at the motel. In the first place, Edmund failed to differentiate between Kelley and the supposed imposter who used Kelley's name at the motel. This blunder, Rule 3.850 counsel insisted, reinforced the State's devastating contention that the men were one in the same. Secondly, Edmund did not use cross-examination to suggest that the man registered under Kelley's name could have actually been Steve "the Greek" Busias, a person from Kelley's neighborhood who allegedly matched physical characteristics of the man at the motel, as described by Carter. The motion stressed that Edmund even stated at one point that Kelley, rather than the theoretical imposter Kelley, registered the car matching Jennie Adams's license plate at the Daytona Inn.

The Rule 3.850 motion also posited other specific deficiencies related to Kelley's third ineffective assistance claim: the broad "Failure to Develop Defense Theories." It contended, for instance, that defense counsel should have

more carefully researched the weather and daylight conditions at the time of the murder. Carter testified that the man registered as Kelley arrived at the motel before 8:30 P.M. on the night of the murder. One of the victim's neighbors, however, testified that she saw two people leaving the victim's home, driving the victim's car with the lights on. Kelley's Rule 3.850 counsel theorized that the late time of sunset on the day of the murder would have made it improbable that the killers drove from the victim's house in Sebring after twilight and reached the motel in Daytona before 8:30 P.M. Yet another line of argument involves comments Kelley made to FBI Agent Ross Davis at the time of arrest, which tended indicate Kelley's knowledge of the murder. On this subject, the motion faulted Kelley's trial counsel for failing to present copies of a 1981 news story about the murder during Davis's cross-examination.

Most significantly, this same third ineffective assistance claim asserted that "defense [counsel] failed to develop facts and interview witnesses to support its 'wrong William Kelley' defense." Purportedly, many witnesses would have been available to testify that Kelley's appearance at the time of the murder differed from that of the man Sweet described as a triggerman.

The remaining claims of ineffective assistance of counsel are less important for purposes of this appeal. The fourth instance cited by the motion involved comments Edmund made during the jury-selection voir dire alluding to Kelley's prior criminal conduct. The fifth instance faulted defense counsel for failing to object to the Allen charge given to the jury. The sixth instance complained that Kelley's defense was ineffective in impeaching John Sweet's credibility and found specific fault with counsel's failure to object when the court declined to answer a question the jury submitted during deliberations about whether Sweet received immunity in Florida for his testimony against Kelley. Finally, the Rule 3.850 motion cited as a seventh instance of ineffective

assistance Kunstler and Edmund's failure to request a change of venue.

Kelley's brief to the Florida Supreme Court appealing the denial of Rule 3.850 relief cast Kelley's ineffective assistance of counsel claims in substantially similar terms.[29]

By the time he sought federal habeas relief, however, many of Kelley's ineffective assistance claims had assumed a strikingly different hue. At the broadest level, Kelley's federal petition asserted ineffective assistance of counsel for "failure to investigate, to depose witnesses, to present a case in defense, and to perform other basic defense functions." The district court ably distilled Kelley's claims down to the following distinct instances of ineffective assistance of counsel:

> (1) the unreasonable failure to investigate and to present evidence on behalf of Kelley; (2) the failure to take pretrial depositions and to seek a more fair trial venue; (3) the failure to impeach, confront, and rebut the state's case; (4) the failure to make an effective closing argument and to object to improper closing argument by the state; and (5) the failure to provide reasonably effective

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[29] Kelley's brief to the court brief differs from his Rule 3.850 motion only insofar as it adds the claim that the Rule 3.850 court erred in failing to admit into evidence an affidavit drafted for, but never signed by, Edmund. Kelley argues that this affidavit was relevant because it accurately reflected Edmund's view of his effectiveness as trial counsel even though Edmund eventually drafted a different affidavit, rather than signing the one at issue. This argument clearly amounts to an appeal of an evidentiary ruling; therefore, it works no material change or supplement to Kelley's ineffective assistance claims.

assistance with regard to the submission of proposed jury instructions.

Kelley, 238 F. Supp. 2d 1325, 1327 (S.D. Fla. 2002)

As noted above, the district court granted Kelley relief for the first of these instances ineffective assistance of counsel: defense counsel's failure to investigate. This decision rested almost exclusively on defense counsel's reliance on disbarred Harvey Brower for handling the pretrial investigation. On the basis of the Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the district court reasoned that Kelley's counsel were ineffective unless they either conducted a reasonable investigation or made a reasonable decision not to investigate. Id. at 691, 104 S. Ct. at 2066 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") Applying this test, the court found that

> neither Kunstler nor Edmund made the decision not to investigate. They mistakenly assumed that Brower, the disbarred attorney/investigation, would conduct his investigation in a conscientious manner. Ultimately, however, Brower failed to perform an investigation, and his failure to present the findings of a pretrial investigation or to file any pretrial motions[30] effectively provided Kelley

[30] We pause to note the oddity of the district court's criticism regarding Brower's failure to file pretrial motions. Brower was not licensed to practice law in Florida. In fact, at the time of Kelley's trial, Brower was disbarred in Massachusetts. It is abundantly clear, then, that Brower could not file pretrial motions. Insofar as the

> with ineffective counsel. Therefore, Kelley's trial counsel was deficient in have a disbarred attorney, lazy to a fault, resolve whether or not to conduct a pretrial investigation.

Kelley, 238 F. Supp. 2d 1325, 1329 (S.D. Fla. 2002). Although it identified them, the district court remarked no further on the remaining instances of ineffective assistance Kelley raised in his petition.[31]

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district court's statement implies that Kelley's counsel (because of Brower or for other reasons) neglected to file pretrial motions in Kelley's case, the statement is plainly wrong. Kelley's counsel argued no fewer than thirteen motions prior to Kelley's first trial. They argued a motion to dismiss the indictment on the eve of Kelley's second trial.

[31] As explained above, the district court identified each of the five instances of Kelley's ineffective assistance claim but grounded its ruling only on the instance concerning counsel's failure to investigate. When it issued this order, the district court was responding to the State's motion under Fed. R. Civ. P. 59. That motion asked the court to amend its September 19, 2002 judgment granting relief based on Kelley's Brady claims and to address the remaining claims asserted in Kelley's petition. Although the district court refused to alter its decision regarding the Brady claims, it agreed with the State's contention that it "must settle all claims in a petition for writ of habeas corpus" to avoid piecemeal litigation and improve the quality of the judicial product. Kelley, 238 F. Supp. 2d 1325, 1327 (S.D. Fla. 2002) (citing Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992). The court then proceeded to treat Kelley's petition comprehensively. Because it noted all five instances of Kelley's ineffective assistance claim, id. at 1325, but only identified one as meriting relief, namely counsel's failure to investigate, we infer that the district court determined that the remaining instances of ineffective assistance are unavailing. Because Kelley did not

We conclude that the district court should have dismissed Kelley's ineffective assistance claim based on counsels' failure to investigate. After careful analysis of the record, we are confident that Kelley has presented no claim to the Rule 3.850 court that fairly notified the State that he intended to challenge his conviction on the ground that his attorneys were constitutionally deficient in their duty to investigate or because they relied on Harvey Brower for this chore. This ineffective assistance claim was not merely a clarified rendition of an exhausted claim, but a new claim altogether.

Kelley's broad Rule 3.850 claim concerning the "Failure to Develop Defense Theories" is the most similar, by far, to the ineffective assistance claim upon which the district court granted relief. Yet the two claims are clearly distinct, in form and in substance. The former, exhausted claim assailed Kelley's trial counsel for failing to develop and even undermining its core theories that Sweet performed the murder unassisted or that the defendant was not the person who registered at the Daytona Inn Motel under Kelley's name. In its brief to the Florida Supreme Court, Kelley's counsel summarized the claim (as also set out in the supplemental brief Kelley filed in appealing his conviction to the Florida Supreme Court) as follows:

> Mr. Kelley's trial attorneys' lack of effectiveness was so plain that appellate counsel sought to present the claim on direct appeal. They failed to investigate, develop, or present readily available evidence that would have supported their own defense theories while presenting the jury with incomprehensible comments which gutted their own theory and which can be supported by no reasonable tactic.

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cross-appeal the district court's order denying those features of the claim, these decisions are not before us.

This claim most closely approached the distinct, unexhausted claim that prevailed in the district court when Kelley argued to the Florida Supreme Court,

> [B]y virtue of defense counsel's incompetence, the jury was presented with only one version [of the facts]: the defendant William Kelley had been registered at the Daytona Inn on the days surrounding the murder of Maxcy, just as John Sweet had testified. This version, however, was far from accurate, and counsel had the tools with which they could have shown the jury the inaccuracy. Without a reason, they simply failed to investigate and thus failed to develop or use the tools that they had.

The Rule 3.850 court and, eventually the Florida Supreme Court, carefully distilled Kelley's broad "failure to develop defense theories" claim into seven specific grievances:

> 1. Counsel failed to adduce evidence that the handwriting on the motel registration record was not the defendant's. . . .
>
> 2. Counsel stipulated to the State's evidence linking the Mr. and Mrs. William Kelley registered at the Daytona Inn Motel to the motor vehicle owned by Jennie Adams. . . .
>
> 3. Counsel failed to point out the distinctions between the man at the Daytona Inn Motel, as described by Kaye Carter, and the defendant. . . .

4. Counsel failed to investigate and utilize the inconsistencies in the time periods on the evening of the murder. . . .

5. Counsel failed to interview and call witnesses to testify regarding the defendant's physical characteristics in 1966. . . .

6. Counsel failed to obtain and present evidence (newspaper articles) which would explain the defendant's knowledge of the Maxcy killing when he was arrested. . . .

7. Counsel failed to obtain affidavits and present testimony from three attorneys that the defendant contacted them to determine if there was a warrant for the defendant's arrest.

Kelley, 569 So. 2d at 759-60. Clearly, the Florida courts comprehended in these arguments no intimation that Kelley's defense counsel flouted their general duty to investigate or, alternatively, decide not to investigate by relying on Brower for this aspect of the trial preparation. The State did not divine this argument either, and, consequently, its own brief to the Florida Supreme Court articulated no rebuttal to the novel claim that prevailed in the district court.

The silence of the supreme court and the State in this regard is unsurprising. Nowhere in the portion of Kelley's brief asserting ineffectiveness for the failure of his counsel to develop defense theories did Kelley mention Harvey Brower. Indeed, in all 101 pages of Kelley's brief to the state supreme court, Brower's name appears only twice, both times in a single paragraph:

> Other noteworthy and telling matters came to light at the [Rule] 3.850 hearing. Harvey Brower, a disbarred attorney, did much of the investigation and preliminary legal work prior to Mr. Kelley's first trial. Apparently, Mr. Brower supplied a list of names and addresses of potential witnesses to the defense, and the defense learned that the addresses listed were incorrect--they did not represent actual addresses.

This paragraph--unique in its mention of Brower--appears not in a discussion of trial counsel's investigatory dereliction, but rather in the course of Kelley's separate evidentiary argument that the Rule 3.850 court erred by excluding from evidence an unsigned affidavit regarding Edmund's effectiveness.[32]

In stark contrast to his brief to the Florida Supreme Court, Kelley's federal habeas petition expends almost seventeen pages arguing that his trial counsel were ineffective for their "unreasonable failure to investigate." Each of these pages is devoted almost exclusively to criticizing counsel for their reliance on Brower. Indeed, the very first sentence of the section reads,

> Virtually all pretrial matters were delegated to the incompetent hands of one Harvey Brower, a Massachusetts former lawyer and federal felon

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[32] This section of Kelley's brief is entitled, "The Judge Should Have Granted Mr. Kelley's Offer to Admit Into Evidence Jack Edmund's Unsigned Affidavit." By way of background, Kelley's Rule 3.850 counsel drafted an affidavit regarding Edmund's performance at trial and asked him to sign it. Edmund refused to sign this particular document and eventually drafted and signed a different affidavit on this subject and provided it to the defense. See supra note 29.

who was disbarred in 1979 for defrauding a former nun out of $ 11,400 in phony stock shares and a loan to a non-existent third party.

Throughout this extensive argument, Kelley cites repeatedly to four appended materials: two Massachusetts judgments, one in which Brower was censured and another in which he was disbarred; and two affidavits of Massachusetts attorneys who attested to Brower's incompetence or irresponsibility. Tellingly, these exhibits were never presented to the state courts. We conclude that this earlier omission was no oversight; the appended materials appear for the first time before the district court because the federal proceeding marked the first appearance of Kelley's claim that his defense counsel denied him a constitutional right by relying on Brower to conduct their pretrial investigation.

Our concerns for comity, judicial efficiency, and fairness to the respondent preclude us from finding that the ineffective assistance claim that prevailed in the district court was properly exhausted. Recharacterizing the claim Kelley presented to the Rule 3.850 court at this late hour as a challenge to the counsel's reliance on Brower for pretrial investigation would "fundamentally alter the legal claim[s] already considered by the state courts" such that we could not consider the restated claim as exhausted. Vasquez v. Hillery, 474 U.S. 254, 260, 106 S. Ct. 617, 622, 88 L. Ed. 2d 598 (1986). And what we cannot achieve by such recharacterization, neither can we achieve by sewing disjointed factual snippets scattered throughout the Rule 3.850 record into a patchwork federal claim. At the very most, Kelley's singular reference to Brower in his brief to the Florida Supreme Court brief amounts to a "needle[] in the haystack of the state court record." Martens, 836 F.2d at 717. Kelley's other Rule 3.850 claims and other instances of ineffective assistance come nowhere near shouting distance of the issue upon which the district court granted relief.

Our finding of procedural default is in no way disturbed by the fact that Brower's antics were discussed to some degree on the record during the Rule 3.850 hearing. This discussion was not sufficient to "afford the State a full and fair opportunity to address and resolve the claim on the merits." Keeney, 504 U.S. at 10, 112 S. Ct. at 1720." By the time of the hearing, the State could not have prepared for or presented evidence to rebut the argument that defense counsel were deficient in relying on Brower. Morever, even if the evidence Kelley put on at the Rule 3.850 hearing would have supported a finding of ineffective assistance on this then-unasserted instance of that claim, Kelley would not have satisfied the exhaustion requirement. "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." Harless, 459 U.S. at 6, 103 S. Ct. at 277 (citations omitted). To exhaust the claim sufficiently, Kelley must have presented the state court with this particular legal basis for relief in addition to the facts supporting it.

Our conclusion also withstands Kelley's unpersuasive argument that the State waived the requirement of exhaustion. Although prior to AEDPA's enactment, this court held that "the State may waive exhaustion either expressly or impliedly," we explained that such waiver occurs "[w]hen the State has not raised lack of exhaustion in the district court or on appeal. . . . " Atkins v. Attorney General of State of Ala., 932 F.2d 1430, 1431 (11th Cir. 1991) (citations omitted).[33] In this case, the State pled lack of exhaustion in the district court and in its brief to us. Accordingly, exhaustion remains very much a viable issue.

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[33] Where AEDPA applies, states will not be deemed to have waived the exhaustion requirement unless they indicate their intention to waive the requirement expressly. 28 U.S.C. § 2254(b)(3). In fact, the Tenth Circuit has noted that states are now free to raise this issue for the first time on appeal. See Hale v. Gibson, 227 F.3d 1298, 1327 n.12 (10th Cir. 2000).

Because Kelley's petition contains both exhausted and nonexhausted claims, it is a classic "mixed petition." Ordinarily, "a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." Rose v. Lundy, 455 U.S. 509, 510, 102 S. Ct. 1198, 1199, 71 L. Ed. 2d 379 (1982). Rose informed petitioners that they could no longer withhold collateral claims from their state court petitions in the hope that the district court would entertain them on the merits.

Dismissing a mixed petition is of little utility, however, when the claims raised for the first time at the federal level can no longer be litigated on the merits in state court because they are procedurally barred. In such a case, requiring the petitioner to return to state court only to make a futile application for relief simply delays the federal courts' adjudication of his petition. As we observed in Snowden v. Singletary, 135 F.3d at 736 (citations and footnotes omitted),

> when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless "judicial ping-pong" and just treat those claims now barred by state law as no basis for federal habeas relief. . . . [W]here all the unexhausted claims are procedurally barred from being considered in Florida courts, it would serve no purpose to dismiss the petition for further exhaustion because review of those claims is unavailable in state courts.

Without question, the Florida courts will no longer entertain on the merits of the claims Kelley has asserted for the first time in the instant petition. See, e.g., Aldridge v.

State, 503 So. 2d 1257, 1258 (Fla. 1987) (holding that a state prisoner is procedurally barred from raising on a second motion for postconviction relief "somewhat different facts to support his ineffective-assistance-of-counsel claim"). Clearly, Kelley could demonstrate no cause for not having raised the Brower-related instance of ineffective assistance of counsel in the Rule 3.850 proceeding. There was no conceivable impediment to raising it. Consequently, we can address Kelley's remaining claims, rather than remanding the case to the district court with the instruction that it dismiss Kelley's petition.

3. Kelley's Lack of Prejudice from Ineffective Assistance

Although Kelley's procedural default obviates any need to reach the merits of his ineffective assistance claim, we pause briefly to voice our serious skepticism that counsel's reliance on Brower for pretrial investigation could have amounted to a violation of Kelley's rights.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064. More specifically, we have held that

> [t]o succeed on a claim of ineffective assistance, Petitioner must show both incompetence and prejudice: (1) "[P]etitioner must show that 'counsel's representation fell below an objective standard of reasonableness,'" and (2) "[P]etitioner must show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"

Chandler v. United States, 218 F.3d 1305, 1312-13 (11th Cir. 2000) (quoting Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 2473, 91 L. Ed. 2d 144 (1986)) (alterations in original).

Unfortunately, the district court did not find--explicitly or implicitly--that Kelley suffered prejudice as a result of counsel's performance. Recognizing this deficiency in the district court's order, Kelley's attorneys moved the court for clarification on this issue on January 6, 2003:

> [I]n an abundance of caution, Petitioner respectfully suggests that further specificity regarding the Strickland prejudice prong might be warranted in order to minimize the risk that the Court of Appeals might misunderstand this Court's determination and either might (a) fail to recognize that this Court had indeed made the requisite finding under the 'prejudice prong' of Strickland, or might (b) assume that the finding had been made but harbor some uncertainty regarding the basis on which it had been made.[34]

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[34] In support of their motion for clarification, counsel proffered two recommended findings of prejudice. First, trial counsel's shoddy pretrial investigation rendered them unable to call Hobart Willis as a defense witness. Willis testified by videotape at the federal evidentiary hearing that Steven Busias claimed responsibility to him for the Maxcy murder. Apparently, Willis notified Brower that he would be available to testify in Kelley's defense. Second, counsel were unable to utilize the testimony of Joseph Whittington. Richard Mars, an attorney from Bartow, Florida testified at the federal evidentiary hearing that he interviewed Whittington before Kelley's second trial. Ostensibly, Whittington implied that John Sweet had a motive for framing Kelley.

The district court denied the motion for clarification in an order entered on January 8, 2003.

This denial is not surprising. Prejudice would be difficult, if not impossible, to find on this record. Kelley had two trials, and Brower's services were employed only for the first. Obviously, Kelley's conviction resulted from the second trial. By the second trial, Kelley's defense team was well aware of what the State's case would look like, since the State had revealed its hand during the first trial, and the defense team had a transcript of the testimonies of the State's witnesses. Furthermore, the nearly two months that passed between the aborted first trial and the commencement of the second trial--after Brower's inadequacy had been exposed--afforded defense counsel ample time to locate potential defense witnesses and conduct further investigation. According to both of Kelley's trial lawyers, defense counsel did just that. Edmund testified that he and Kunstler sent an attorney to New England after the first trial to corroborate evidence of Sweet's questionable character and to find favorable evidence about Kelley's character. Kunstler's testimony is even more illuminating. During Kelley's state Rule 3.850 hearing, Kunstler was asked,

> During the interim between the first trial and the second trial, did you and Mr. Edmund sit down and discuss: Well, this is how the first trial

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It bears mention that this second asserted prejudice is rather inconsistent with the notion that defense counsel failed to investigate. Furthermore, Edmund did, as part of his calculated trial strategy, argue that Sweet had such a motive. In fact, Edmund testified that he was aware of Whittington and concluded that he was not a valuable witness because Edmund intended to advance a different frame-up motive than that to which Whittington would speak.

> went; now we knew what the evidence is, what the witnesses are, let's do this or let's do that, let's change some things for the second trial?

Kunstler answered, "We did. I don't know if we did it in person. We had a lot of telephone calls. And since Brower had vanished from the face of the earth, Jack [Edmund] had his own investigator from his office. And he put his own investigator to work." Finally, Kelley's attorneys repeatedly testified that they decided against putting on evidence at trial as a matter of strategy,[35] which afforded the defense both the

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[35] For instance, at the Rule 3.850 hearing, the State called Edmund to the stand:

> Q: During the trial or during both trials actually, you and Mr. Kunstler [Kelley's other trial lawyer] did not call any defense witnesses. Mr. Kelley did not take the stand. Was that something that you and Mr. Kunstler discussed or how was it decided as to that aspect of the defense case what would be done or not done as far as presenting witnesses?
>
> A: I don't remember a specific discussion about not calling witnesses. And I don't remember a specific discussion about not calling Bill [Kelley]. But that was one of those decisions that good trial lawyers familiar with the facts could make without any- I mean that really didn't take a decision. It was a matter that was going to be.
>
> Q: Do consider that to be a matter of trial strategy?
>
> A: Of course.

Confronted with a similar line of inquiry at the federal evidentiary hearing, Edmund testified,

first and last closing arguments to the jury at the end of the day. We must be highly deferential to such strategic decisions of counsel. As the Supreme Court instructed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (quotation marks and citation omitted); see also Waters v. Thomas, 46 F.3d 1506, 1518-19 (11th Cir. 1995) (en banc) (observing that "[w]e cannot, and will not, second guess" the "strategic decisions trial counsel are called upon to make"). In sum, the mistrial gave defense counsel two important benefits: (1) a transcript of the State's case, and (2) an additional opportunity to conduct the investigation Brower neglected. Because counsel made full use of these benefits and because they would likely have declined as a matter of trial strategy to give up the right to make the first and last closing arguments so that they could call some of the witnesses who testified at the federal evidentiary hearing, we cannot agree that Brower's inadequate investigation prejudiced Kelley's defense.

B. Prosecutorial Misconduct

> I tried the case the way I thought the case should be tried with the witnesses that I was cross examining. . . . [T]his is not something that should override calling a witness who is a critical witness, but in Florida if the defendant alone testifies or doesn't testify and calls no witnesses the defense has both the opening [and] closing portions of the closing argument. In a case with none or few witnesses I think it is to the advantage of the defense to retain that if possible. Again that was a decision that was, I am sure, jointly made. . . . It is a tactic not to call any witnesses to further impeach Sweet than he had already impeached himself.

1. The Brady Rule

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). As the Supreme Court later clarified, there are three components of a true Brady violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999). Evidence is material so as to establish prejudice only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985).[36] Of course, Brady and its progeny apply only to evidence possessed by the prosecution team, which includes both investigative and prosecutorial personnel. United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989).

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[36] Justice Blackmun wrote for the majority in Bagley, but this quotation is drawn from a portion of his opinion that was joined only by Justice O'Connor. Although a majority of the Court did not agree with this portion of the opinion in its entirety, Justice White wrote a concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, agreeing with the materiality standard quoted above. Bagley, 473 U.S. at 685 (White, J., concurring). Since Bagley, the Supreme Court and this court have repeatedly recognized that this standard governs determinations of materiality for the purpose of deciding Brady claims. See, e.g., Strickler, 527 U.S. at 280, 119 S. Ct. at 1948; Crawford v. Head, 311 F.3d 1288, 1325 (11th Cir. 2002).

An alleged Brady violation presents a mixed question of law and fact, which we review de novo. Wright v. Hopper, 169 F.3d 695, 701 (11th Cir. 1999).

2. Application of the Brady Rule to Kelley's Case

The Rule 3.850 court, and the Florida Supreme Court on appeal, rejected Kelley's Brady claims on the merits. The district court disagreed with the state courts' rulings and concluded that Kelley was entitled to relief on the claims he had presented to the Rule 3.850 court. The district court, relying on the evidence presented to the Rule 3.850 court and at the federal evidentiary hearing, found that five items of withheld evidence were exculpatory. It further found that the State had materially prejudiced Kelley's defense by withholding those items. The five withheld items include

> (1) a Massachusetts immunity order, indicating that Sweet received immunity from that state on March 13, 1981;
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> (2) The Florida Department of Law Enforcement Investigative Report authored by Agent Joe Mitchell, dated February 21, 1981;
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> (3) the transcript of Sweet's first trial;
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> (4) the second of two police reports authored by Special Agent Roma Trulock, reflecting observations of witness Kaye Carter; and
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> (5) a fingerprint report, constructed from prints at the victim's house and car, containing no positive matches to Kelley's prints. Without

identifying particular prejudices, the district court remarked in general terms,

> Disclosure of the suppressed evidence to competent counsel would have made a different result much more probable. The essence of the State's case was the testimony of Sweet. Disclosure of his immunity and transcript from his first trial would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.

Kelley, 222 F. Supp. 2d 1357, 1367 (S.D. Fla. 2002).

Whether the withheld items the court seized upon in granting Kelley relief are considered individually or collectively, we conclude that Kelley suffered no Brady prejudice as a result of the withholding.

a. The Massachusetts Immunity Order and the Joe Mitchell Report

On March 13, 1981, after being informed that Sweet had invoked his right against self-incrimination before a Massachusetts grand jury involving "offenses of larceny, breaking and entering a building, violations of the narcotic and harmful drug laws, and lending or money or thing of value in violation of the General Laws [of Massachusetts]," the Supreme Judicial Court of Suffolk County, Massachusetts entered an order granting Sweet transactional immunity. Its order stated, in relevant part:

> John J. Sweet shall not be prosecuted or subject to any penalty or forfeiture for or on

> account of any transaction, matter or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal or civil proceeding against him in any court of the Commonwealth, except in prosecution for perjury or contempt while giving testimony or producing evidence under compulsion . . . .

On March 29, 1984, in his closing argument to the jury at the end of Kelley's trial, Assistant State Attorney Hardy Pickard stated that Sweet did not have to testify as a prosecution witness against Kelley in Florida to obtain the immunity the Massachusetts court granted him.[37] The district court found, albeit implicitly, that had the State given defense counsel copies of the immunity order and Joe Mitchell's investigative report prior to Kelley's trial, the prosecutor would not have made the statement at all or, if he made it, defense counsel--having the final closing argument to the jury--would have convinced the jury that the prosecutor's

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[37] Specifically Pickard argued,

> John Sweet did not have to give the police Kelley to get immunity. John Sweet got immunity from Massachusetts on a long list of things. It has nothing to do with the Maxcy case or giving them Kelley on the Florida cases.
>
> He already had his immunity from Massachusetts on loan sharking, whatever that long list of things were. He didn't have to give them Kelley to get immunity. That came up later after he went to Massachusetts and thirty investigators or however many he said were questioning him about all sorts of crimes in Massachusetts.

(Emphasis added).

statement was a lie.[38] But for the lie, the district court concluded, there was "a reasonable probability that . . . the result of the proceeding would have been different." Bagley, 473 U.S. at 682, 105 S. Ct. at 3383.

The district court found separate Brady violations in the State's failure to disclose the immunity order and the Mitchell report. The court also found a symbiotic relationship between the two items, such that, when considered together, the items' materiality was significantly enhanced and clearly established a Brady violation. We consider these items separately and then together.

Nothing in the immunity order states that the Massachusetts court granted Sweet immunity on the condition that he testify against Kelley in Florida.[39] To find that the court imposed such a condition, we would first have to infer that the court entered the order after obtaining Sweet's commitment to testify against Kelley in Florida. Since the order does not reveal such commitment, the commitment would have to to have been made in a separate writing or given orally. We would have to infer further that had Sweet not made the commitment, the court would not have granted him immunity. To draw that inference, we would have to

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[38] An alternative implicit finding is that the court would have instructed the jury to disregard the prosecutor's statement.

[39] As a threshold matter, the order cannot constitute Brady material because there is no indication in the record that the State possessed the order, nor is there any indication that the order was more accessible to the State than it was to Kelley's defense team. See Meros, 866 F.2d at 1309. Although the Massachusetts court sealed the grand jury's application for Sweet's immunity and the testimony he gave the grand jury about crimes in Massachusetts, the immunity order itself was a public document and thus available to Kelley's defense team. Although the State was not required to obtain a copy of the immunity order and turn it over to the defense, we demonstrate that the order lacked Brady materiality as a matter of law.

infer that the court would have ignored the grand jury's request, which was based on the need for Sweet's testimony regarding several serious crimes. Put another way, we would have to infer that the court was more interested in helping the Florida authorities obtain Sweet's testimony than it was in honoring the grand jury's request. The counter-inference is far more likely: the court was so inclined to grant the grand jury's request that it gave Sweet transactional immunity rather than use immunity. In sum, the immunity order, standing alone, does not permit the inference that the prosecutor lied when he told the jury that the Massachusetts immunity order was not conditioned on Sweet's promise to testify against Kelley in Florida. Moreover, as will become clear from an examination of the Mitchell report, there can be no doubt that court did not grant Sweet immunity because he promised to testify for the State at Kelley's trial.

We turn now to the Mitchell report to see if it permits the inference that the prosecutor lied in his closing argument to the jury. The district court found that the State's "fail[ure] to disclose to defense counsel Agent Joe Mitchell's Florida Department of Law Enforcement Investigative Report dated February 21, 1981"[40] violated the Brady rule. Kelley, 222 F. Supp. 2d 1357, 1363 (S.D. Fla. 2002). The report generally describes conferences that took place on February 21 and 23, March 6 and 12, 1981 concerning Kelley's and Sweet's criminal activities, including the Maxcy murder. Some of the conferences were held telephonicially and some in person. All involved law enforcement authorities; Sweet was physically present on March 12.

According to Mitchell's report, on February 21, Rex Amistead, Director of the Regional Organized Crime

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[40] Although Mitchell's report was dated February 21, the report refers to events that occurred after that date. A notation appears at the bottom of the report indicating that it was dictated on March 23 and typed on May 6, 1981.

Intelligence Center in Memphis, Tennessee, called Mitchell with the following information: Major John Regan of the Massachusetts State Police had informed him that the State Police were "conducting a major multi jurisdictional [sic] investigation involving organized crime activities in . . . Massachusetts and a witness whom they had in protective custody had provided information pertaining to [the Maxcy] murder." The witness was John Sweet. The information was that Maxcy had been killed in 1966 by William Kelley, "a . . . hit man" Sweet had hired. "Armistead emphasized that Major Regan . . . indicated that Sweet was willing to testify in behalf of the State of Florida [in the prosecution of Kelley for Maxcy's murder], providing he could be granted immunity . . . ." Mitchell was aware of the "the homicide . . . Sweet had been discussing with Major Regan" and told Director Armistead that Sweet had been indicted for Maxcy's murder, and that the victim's wife, Irene Maxcy, who testified at Sweet's trial, had subsequently been charged with perjury and found guilty. Mitchell also told Armistead that he was unaware of the "disposition of Sweet's charges."

> According to . . . Armistead, Major Regan was requesting assistance from the [FDLE] in checking into the investigation of the homicide of von Maxcy, and the possibilities of using testimony by Sweet on charges against suspect William Kelley of the Boston area. Further, Major Regan advised that their department is scheduled to indict and charge suspect Kelley with a number of felonies . . . . It was felt that if the State of Florida could prosecute Kelley in th[e] 1966 homicide the State of Florida could make a stronger case against Kelley.

Mitchell advised Director Armistead that "Major Regan's request would relayed to the Director of the Division of Law

Enforcement . . . to determine what action may be made by the [FDLE] in the case."

On February 23, following Director Frank Tassone's instructions, Mitchell informed the State Attorney of Major Regan's request for investigative assistance and Sweet's willingness to testify against Kelley in Florida provided that he be granted immunity there with respect to the Maxcy murder.

On March 6, several parties interested in Sweet's potential testimony met in the State Attorney's Office in Bartow, Florida. Attendants at the meeting included law enforcement officers, representatives of the State Attorney's office, the State Attorney who had prosecuted Sweet in 1967 (retired at the time of the meeting), FDLE personnel (including the case agent in the Maxcy investigation), a Massachusetts district attorney, and Paul A. Cataldo (a Massachusetts lawyer who was "representing Sweet in the immunity for the State of Massachusetts cases"). "As a result of the meeting, it was agreed . . . that representatives from the State Attorney's Office . . . and the [FDLE] would proceed to Boston . . . and interview John Sweet for the full details in connection[] with the . . . Maxcy homicide . . . ."

On March 12, State Attorney Quillian Yancey, Assistant State Attorney Hardy Pickard, and Mitchell interviewed Sweet in the "Office of the District Attorney, New Bedford, Massachusetts." At the request of Sweet's attorney, Steve Rusconi, a young lawyer in Cataldo's office, the interviewers neither placed Sweet under oath nor tape recorded what he said. Mitchell's report summarizes what Sweet related, which is essentially what he testified to at Kelley's trial. Mitchell's summary of the information obtained from Sweet appears verbatim in the margin.[41]

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[41] In relevant part, the report states:

[Sweet] admitted to his participation in the homicide of . . . Maxcy. He advised that initially has was engaged in conversation with the wife of . . . Maxcy, Irene Maxcy, who mentioned to him that she was in fear that Maxcy had intentions of divorcing her and cutting her out of any portion of the estate. After that, Irene Maxcy, discussed with him concerning doing away with . . . Maxcy, and she asked him to contact his friends in Boston, Massachusetts, to discuss the killing of her husband. Sweet further emphasized, based on the request of Irene Maxcy, he proceeded through a close associate of his, WALTER BENNETT, who hired VON ETTER white/male, (NFI) and WILLIAM KELLEY, of the Boston, MA, area, to do the killing. Sweet further indicated, that Mrs. Maxcy, provided the finances to hire Walter Bennett, and he delivered Bennett a $ 5,000 fee in advance and later they traveled to Boston, Massachusetts, where he delivered the balance of $ 15,000 dollars personally to Walter Bennett, at a Howard Johnson's Motel parking lot, just south of Boston, Massachusetts.

Sweet indicated that after Bennett was given the $ 5,000 down payment, he sent Von Etter down to review the situation and Sweet met with him to show him the area and after that, they set up a prearranged date which would be suitable for the hit man to arrive and commit the murder. Further, Sweet indicated that on the day of the murder, Mrs. Maxcy left the doors unlocked to the house and Etter and Kelley drove to a shopping center parking lot, Sebring, Florida, where Sweet met them and drove them to the Maxcy house and dropped them to await Maxcy's arrival. At the time he dropped them at the house, they were in possession of a bag containing several knives and pistol's [sic] and after they were through with the assignment, they were scheduled to drive the victim's vehicle back to the shopping center where he had left their vehicle after he returned from the victim's house.

The district court, in concluding that the Mitchell report constituted exculpatory evidence, relied on the following passage in the report regarding Director Armistead's telephone conversation with Mitchell: "Mr. Armistead emphasized that Major Regan had indicated that Sweet was willing to testify in behalf of the State of Florida, providing he could be granted immunity in the 1966 case." The district

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After the killing, Mrs. Maxcy took the money out of a trust account from an Orlando Bank to furnish to Sweet to be delivered to Walter Bennett in Massachusetts to pay the balance of the $ 20,000 payment.

A few months after the incident, Von Etter's body was found in the trunk of a[n] automobile in the Boston, Massachusetts, area, and also Sweet indicated that Walter Bennett and his brother were also missing from the area, and all intelligence revealed that they were both killed.

Sweet emphasized that he had known William Kelley a number of years, but did not see him for 3 years after the killing and advised that Kelley had been involved in the rackets associated closely with organized crime associates in the Boston, Massachusetts, area for many years. Sweet further indicated, that Kelley had recapped the scene of killing . . . Maxcy, and he advised that they had thrown a sheet over Maxcy's head when he arrived in his house and stabbed him four (4) times. The [sic] indicated Maxcy was a powerful man and they had to shoot him. Further, Mr. Sweet emphasized that Kelley had been continually involved in criminal activities and was suspected [to be] involved in several unsolved homicides, but had not been charged. Mr. Sweet emphasized that he had voluntarily come forth to the Massachusetts State Police and was agreeable to provide information pertaining to Kelley's current activities and also had agreed to testify against him. Sweet advised that he was agreeable to testify for the State of Florida, in connection[] with the . . . Maxcy homicide if the State proceeded with charging William Kelley with the homicide.

court found this passage "vastly at odds with the state's representation [to the jury in closing argument] at the trial." Kelley, 222 F. Supp. 2d 1357, 1363 (S.D. Fla. 2002). "During the State's closing argument, Pickard argued to the jury that Sweet did not have to give Kelley to the authorities in order to get immunity. However, it is clear from the withheld report that Sweet was willing to testify if he could be granted immunity." Id.

It is obvious to us that the district court was confusing the immunity granted Sweet in Florida with the immunity granted him in Massachusetts. The court also failed to realize that the Mitchell report discloses what Sweet wanted for testifying against Kelley, to-wit: Florida immunity. The report contains not a word about Sweet obtaining immunity from a Massachusetts court and what, if anything, he would have to do to obtain that immunity. What the Mitchell report has to say on the subject of immunity is that Sweet was willing to testify in a case brought against Kelley in Florida if Florida gave him immunity. No statement attributed to Major Regan or anyone else in the Mitchell report yields a permissible inference that Sweet was willing to testify in Florida only if the Massachusetts court granted him transactional immunity with respect to the crimes the Massachusetts grand jury was investigating. Finally, nothing in the Mitchell report even suggests, much less establishes circumstantially, that Pickard's comment to the jury--that Sweet did not have to agree to testify against Kelley in Florida to gain immunity in Massachusetts--was a lie.[42] To the contrary, the record at hand leads inexorably to the fact that Pickard told the truth.

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[42] The Mitchell report indicates that the Massachusetts grand jury was conducting a "major multi jurisdictional investigation involving organized crime activities in the State of Massachusetts." The grand jury apparently considered both Sweet and Kelley as suspects. Under the immunity the Massachusetts court granted Sweet, he might be asked questions that would implicate Kelley. If he refused, the court could hold him in civil contempt--whether or

We move then to the district court's finding that the immunity order and the Mitchell report, if considered together, contained exculpatory evidence. The district court was led to this finding because the Massachusetts court granted Sweet immunity on March 13, 1981, the day after the Florida officials interviewed Sweet. The court's finding necessarily implies that there was a connection between the grant of immunity and the interview. In the district court's mind, the connection was this: the Massachusetts court was not going to grant Sweet immunity unless the Florida officials reported that Sweet had given them what they needed. In other words, the Massachusetts court was prepared to deprive the grand jury of Sweet's testimony about widespread criminal activity in Massachusetts unless Sweet agreed to testify against Kelley in Florida if the Highlands County grand jury indicted Kelley for the Maxcy murder (which it eventually did occur on December 16, 1981). Such an implication strains credulity. Sweet was in protective custody because those he could incriminate wanted him silenced. The grand jury needed his testimony and asked the court to grant him immunity. The notion that the court granted Sweet immunity because some Florida officials in effect gave the court the go-ahead sign is preposterous.

The Rule 3.850 court and, later, the Florida Supreme Court also examined the Mitchell report and the immunity order. The supreme court explicitly found that there was "no evidence to support the inference that Sweet's Massachusetts immunity was contingent upon his testimony in the defendant's Florida trial." Kelley, 569 So. 2d at 758. As we have shown at length, this state-court factfinding is more than "fairly supported by the record." As such, it is entitled to our deference. Purkett v. Elem, 514 U.S. 765, 769, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834 (1995) ("In habeas

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not he had told the court, when it granted him immunity, that he was willing to testify against Kelley.

proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are 'not fairly supported by the record.'" (quoting pre-AEDPA 28 U.S.C. § 2254(d)(8))). Since the district court's implicit finding that Sweet had to testify against Kelley in Florida to gain immunity in Massachusetts cannot be squared with the deference due to the state court's finding, we must reject it. And as that finding crumbles, so too does the district court's conclusion that Mitchell's report could have affected the result of Kelley's trial.

Because the record cannot support the finding that Pickard lied to the jury during the State's closing argument, it is clear that information about Sweet's immunity was valuable only for the purpose of impeaching Sweet's credibility as a witness. It bears emphasis that Kelley's defense, despite its lack of the immunity order and the Mitchell report, was neither deprived of nor forwent any opportunities to discredit Sweet by discussing the scope of his Massachusetts immunity. While the application to the Massachusetts court for Sweet's immunity and Sweet's resulting testimony were sealed, Kelley's defense learned a great deal about Sweet's immunity from the transcript of a Massachusetts criminal trial at which Sweet testified at length. Jack Edmund used this transcript to cross-examine Sweet thoroughly about his immunity in Massachusetts. For example, Edmund succeeded in getting Sweet to admit that he testified numerous times for Robert Kane, an assistant district attorney for Bristol County. Sweet went on to acknowledge that he received immunity for every offense he discussed with Kane and other Massachusetts prosecutors. Edmund then catalogued a litany of crimes for which the Massachusetts court, in the order it entered on March 13, 1981, had granted Sweet immunity. Among these, Sweet admitted to receiving immunity for loan sharking, hijacking, drug violations, larceny, arson, bribing a police officer, participating as an intermediary in a bookkeeping

operation, making false reports to police officers, and counterfeiting. Sweet also acknowledged that the state of Massachusetts agreed not to prosecute him for his involvement in "manag[ing]" prostitution, although he quibbled as to whether a state court had given effect to the understanding in a formal immunity order.

Edmund also cross-examined Sweet about his immunity in Florida:

> Q: Mr. Sweet, you received immunity for first degree murder in Florida, didn't you, sir? That is the killing of Von Maxcy; right? Is that a fair statement?
>
> A: Yes, sir.

Responding to subsequent questions, Sweet proceeded to admit that he also received immunity for the perjury he committed in both of his own Florida trials. The Mitchell report's indication that Sweet wanted immunity in Florida in exchange for testimony there could not have added to Sweet's bald admissions regarding his Florida immunity.

Finally, despite the disadvantages Kelley's federal habeas counsel claim Kelley suffered because the State failed to give his trial attorneys copies of the immunity order and the Mitchell report, his trial attorneys proved themselves readily able to seize every opportunity to use information about Sweet's immunity in Massachusetts and Florida in their first and last closing arguments to the jury at the close of Kelley's trial. In his opening argument, Kunstler lamented to the jury that Sweet "comes down here and he gets immunity for murder and perjury." Edmund, in his closing argument, roughly paralleled Sweet's various immunities to transgressions of the Ten Commandments:

[Sweet] has immunity for first degree murder. Thou shalt not kill.

He has immunity for perjury in that first degree murder trial. Thou shall not bear false witness.

He has immunity for larceny. Thou shalt not steal.

He wasn't prosecuted for adultery. Thou shalt not commit adultery.

He won't be prosecuted for stealing Mrs. Irene Maxcy away from her husband. Thou shalt not covet thy neighbor's wife.

He will not be prosecuted for taking Von Maxcy's estate money. Thou shalt not covet thy neighbor's goods.

Nor will he be prosecuted for loan sharking. Thou shalt not break thy neighbor's head.

He will not be prosecuted for breaking and entering, nor shall he be prosecuted for the prostitution, the narcotics, the bribery, the falsely reporting a crime or counterfeiting.

Make your message to the State of Florida ring out loud and clear . . . prosecute him for lying about that man [Kelley] and send [Sweet] where he justly belongs.

At the end of the day, the defense counsel's purpose for wanting to exploit Sweet's immunity arrangements was to convince the jury that Sweet was a sullied witness. There can be no doubt on this record that counsel succeeded without the Massachusetts immunity order and the Mitchell report. If introduced into evidence as part of Kelley's defense, these two exhibits would have constituted, at best, cumulative evidence. See Routley v. Singletary, 33 F.3d 1279, 1286 (11th Cir. 1994) (holding that no prejudice resulted from state's failure to supply the defense with a witness's immunity agreement and related documents where defense counsel alerted the jury to the witness's immunity and potential bias through cross-examination, rendering the disputed evidence no more than "cumulative impeachment" of the witness). At worst, the exhibits--especially the Mitchell report--would have been highly prejudicial to Kelley. Recall that the report revealed that the Massachusetts grand jury was conducting a multi-jurisdictional "investigation involving organized crime activities in the State of Massachusetts," and that the State Police wanted Kelley indicted for "a number of felonies."[43] We do not hesitate to conclude that the State's withholding of the immunity order and the Mitchell report did not violate the Brady rule.

b. Transcript of John Sweet's First Trial

The State Attorney in office at the time of Sweet's prosecution, in 1967 and 1968, was Glenn Darty. The State Attorney in office at the time of Kelley's prosecution in 1983, sixteen years later, was Quillian Yancey. Assistant State

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[43] We have not overlooked the possibility that defense counsel would have chosen not to admit the Mitchell report into evidence, electing instead to call Mitchell to the witness stand. Depending on how far counsel opened the door on direct-examination, the State might be able on cross to explore Kelley's criminal activities in Massachusetts.

Attorney Harding Pickard handled Kelley's prosecution for Yancey.

Prior to Kelley's first trial, defense counsel, recognizing that Sweet would be the State's star witness, made a discovery request that Pickard produce the transcripts of both of Sweet's trials. Pickard turned over the transcript of Sweet's second trial, the trial that resulted in Sweet's conviction. But he did not produce the transcript of Sweet's first trial, which resulted in a hung jury and a mistrial. He apparently thought that a transcript had not been prepared.

In responding to Kelley's Rule 3.850 motion in January 1988, the Florida Attorney General's office, which represents the State in Rule 3.850 proceedings in capital cases, produced transcripts of portions of Sweet's first trial. The record does not contain or even suggest the answer to the question of whether State Attorney Yancey's office had the transcript of Sweet's first trial in its possession at the time of Kelley's discovery request. The answer, however, is not important. The transcript is legally immaterial because Kelley's attorneys had available to them during both of Kelley's trials the entire transcript of Sweet's second trial, and that transcript contained the essence of Sweet's testimony at his first trial.

In reaching the opposite conclusion, the district court pointed to two pieces of information that were contained in the first transcript but not the second. First, the undisclosed transcript shows that Sweet testified about Irene Maxcy's sexual deviance, including allegations that she engaged in bestiality. Although Irene Maxcy did not testify at Kelley's trial, Kelley's Rule 3.850 counsel posited--and federal habeas counsel do so now--that this testimony about her would have been valuable in impeaching Sweet. This testimony demonstrates that Sweet was willing to testify to anything that would further his interests.

What Sweet said about Irene Maxcy's sexual deviancy is immaterial primarily because the Florida Supreme Court, in

reviewing the Rule 3.850 court's denial of relief, concluded that evidence of her alleged deviancy would not have been admissible at Kelley's trial. Kelley, 569 So. 2d at 757. Thus, its unavailability could not have affected the result of the case so as to create prejudice. A reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence. Spaziano v. Singletary, 36 F.3d 1028, 1044 (1994). Furthermore, the Rule 3.850 court explicitly found that Kelley's "defense counsel w[ere] aware of the allegations concerning Mrs. Maxcy." Kelley, 569 So. 2d at 757. Again, we must defer to this finding of fact because the record supports it. See Purkett, 514 U.S. at 769, 115 S. Ct. at 1771.[44] Both of Kelley's defense attorney's indicated some knowledge of these allegations at the Rule 3.850 hearing. Finally, this highly inflammatory testimony about Irene Maxcy, who did not testify at Kelley's trial, could not have been more useful to show Sweet's willingness to lie at trial than Sweet's own, unequivocal testimony that he committed perjury repeatedly in both of his trials.[45] Armed with this admission, defense

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[44] Moreover, nothing in the federal habeas proceeding contradicts the finding.

[45] At Kelley's second trial, for example, Sweet testified as follows on cross-examination:

> Q: I am talking about the number of lies. Would they be in the hundreds of lies that you have told under oath, Mr. Sweet?
>
> A: Well, it would be both trials. I'm sure it was--
>
> Q: It was question after question after question in your first trial that you lied about, wasn't there, sir?
>
> A: Yes, sir.

counsel had little to gain by exploiting the perverted allegations in Sweet's first trial transcript.

Second, the undisclosed first-trial transcript reveals that the jury heard recorded phone conversations between Sweet and Irene Maxcy. During these conversations, Sweet stated that he did not know anyone named "William Kelley." The transcript also reveals that Sweet testified that he believed Irene Maxcy's assurances that she was not tape recording their conversations.

Sweet's denial of knowing Kelley might seem critical in a vacuum, but the force of that denial is eroded almost entirely by Sweet's admission that, after the murder, he routinely denied any knowledge of or involvement with Kelley. For instance, at Kelley's second trial, Edmund elicited the following testimony from Sweet on cross-examination:

> Q: During your first trial you denied knowing Bill Kelley, didn't you?
>
> ---
>
> Q: And you were under oath?
>
> A: Yes, sir.
>
> Q: And you raised your hand to swear to God to tell the truth, the whole truth, just like you did today?
>
> A: Yes.
>
> Q: And you lied?
>
> A: Yes, sir.
>
> Q: You lied to save your life?
>
> A: Yes, sir.

A: I did.

Q: When you were talking to the investigators prior to your first trial, you denied knowing Bill Kelley, didn't you?

A: I did.

Q: During you second trial you denied knowing Bill Kelley, didn't you?

A: I did.

. . .

Q: When Bill Kelley beat you up and you went to the hospital, you even lied to the hospital about how it happened, didn't you?

A: I did.

. . .

Q: Could you estimate for this Jury how many lies you have told under oath, sir, over the period of the last seventeen and a half or eighteen years?

A: Well, since I have known Bill Kelley, any involvement there, I have lied about knowing the man.

Sweet's recorded conversations with Irene Maxcy transpired after the murder, when Sweet, according to his own testimony, had commenced lying about knowing Kelley. The phone conversations simply corroborate Sweet's testimony about this pattern of denial.

Even without a transcript of the testimony Sweet gave at his first trial, defense counsel were able to take advantage of Sweet's specific admission that he had denied knowing Kelley. For example, in his opening argument to the jury, Kunstler said,

> [John Sweet] committed perjury twice down here. He took the same oath. He is saying to you, believe me now. I am being good now. I am going to tell you all the truth. But he told two other juries total lies. He told them he had nothing to do with the murder, he knew nothing about it, he didn't know Kelley.

Consequently, there can be no reasonable probability that the availability of a transcript of Sweet's first-trial testimony could have affected the outcome of Kelley's trial.

c. Roma Trulock Report

Kaye Carter lived at the Daytona Inn Motel at the time of the murder; her parents were the motel's managers. The prosecution theorized that both of triggermen, Kelley and Von Etter, roomed at the Daytona Inn Motel before driving down to Sebring to murder Maxcy. In fact, the motel's records from that time reflect guests registered as "Mr. and Mrs. William Kelley." Carter, who was only seventeen when the murder occurred, testified that she met Von Etter, the man registered as Kelley, and two females traveling with the men. Carter claims she had dinner with Kelley and the others on October 3, 1966, the very evening Maxcy was slain. Through

this association, Carter became familiar with Kelley's appearance.

Special Agent Roma Trulock of the FDLE interviewed Carter on March 17, 1967 and obtained a description of the man Carter knew as Kelley at the motel. Trulock then summarized Carter's one-time description of Kelley in two different investigative reports: one dated March 17, 1967, the second dated March 18, 1967. Although defense counsel acquired Trulock's first report, the State never produced the second the report.

The district court found that the "suppression of the [second] report violated Kelley's constitution [sic] right and prejudiced his defense. " Kelley, 222 F. Supp. 2d 1357, 1366 (S.D. Fla. 2002). In the court's view, distinctions in Trulock's reports regarding Carter's description of Kelley rendered both reports material to Kelley's defense. The court compared the documents as follows: According to Trulock's first report, which was dated March 17, 1967 and was disclosed to the defense, Carter described the person she knew as Kelley "as being about 40, 6' to 6' 2" tall, medium build, dark hair, (kind of curly) with a deep husky voice"; according to Trulock's second report, which was dated March 18, 1967 and was not disclosed to the defense, Carter described Kelley "as being about 40, 6' medium build, dark hair, kind of curly, husky voice." Additionally, the second report, but not the first, contains Trulock's following reflection about Carter's identification: "This picture of William Harold Kelley looks something like him although she is sure that he was older than the 26 years on his description." Id. at 1365.

The district court offered three reasons why the second report was materially exculpatory, even though the defense had the first report. First, it argued, the two-inch height discrepancy between the reports was critical because Kelley, in fact, stood at about 6' 5". Second, the notation that Carter was "sure" that Kelley was older than twenty-six was material because Kelley was only twenty-three on the night of the

murder. And third, the notation that Carter thought the picture presented by Trulock looked "something like" Kelley revealed her uncertainty and, perhaps, constituted a negative identification.

To be sure, the defense was entitled to at least one of these reports. Both reflect similar descriptions by Carter that differ considerably from Kelley's actual appearance at the time of the murder. Ostensibly, Kelley was twenty-three and youthful in appearance. He had straight blond hair and stood well over 6'. Both of Trulock's reports suggest that Carter thought the man identified as Kelley at the motel was shorter, much older, and had dark curly hair.

This conflicting description was important to Kelley's defense, and counsel ensured that the jury knew that. As noted above, defense counsel had the benefit of delivering the first and last closing arguments to the jury because they elected not to present a case. In the first argument, Kunstler cast Carter as a truly objective witness, one who has "absolutely nothing to gain or lose by this case." He emphasized that the State never asked Carter to identify Kelley at trial, and he argued that at least some aspects of Kelley's appearance, such as his height, should not have changed so much over the years since the murder that Carter should have been unable do so if the defendant Kelley and the man Daytona Inn Motel were in fact one in the same. Defense counsel underscored these troubling inconsistencies time and again at Kelley's trial. "You have to decide whether the man having the name William Kelley," Kunstler reasoned to the jury, "was a twenty-three year old . . . six foot six man with blondish hair or a forty-year-old man with medium build and dark curly hair and four inches shorter than Mr. Kelley is. That testimony is very significant." In his closing argument, Edmund poignantly directed Kelley to stand so that the jury could observe him. "I'll ask him to stand up," Edmund explained, "because the man who registered into the Daytona Beach Inn over there was a man who has been described by

the only person who's testified in this court to describe that individual as being forty years old . . . six foot to six foot two inches tall with black curly hair."

Acknowledging the tremendous import of Carter's description, we cannot agree that the differences between Trulock's two reports were so significant that defense counsel needed both reports to argue Kelley's case to the jury effectively. Every significant aspect of Carter's description was reflected in both reports. We need not decide whether a two-inch difference in Kelley's height estimates could be material because the reports reflect no such inconsistency. Rather than an incongruent height estimate, the first report simply reflects a two-inch range, i.e., 6' to 6' 2", the bottom end of which is identical to the height estimate noted in Trulock's second report. Furthermore, the record indicates that the two reports were based on a single interview with Carter. After all, the reports were dated one day after the next, and the Florida Supreme Court characterized the second, nondisclosed report as a summary of the "original full report," which was disclosed to the defense. Kelley, 569 So. 2d at 757-58.[46] This fact suggests that the discrepancy in

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[46] Trulock interviewed Carter twice, once on March 17, and once March 20. But in both reports, Carter's description of Kelley clearly derives from the March 17 interview alone. The second report, which was not provided to defense counsel, was completed prior to the March 20 interview and thus reflects the March 17 meeting only.

Trulock's first report, which was disclosed, reflects comments from both interviews. Comments about the second interview appear in a short addendum dated March 20, 1967. The addendum provides no additional description of Kelley's physical features. In fact, it reflects nothing more than Carter's statement that "the unknown couple" accompanying Von Etter at the Daytona Inn Motel was registered at the motel "under the name of William Kelley." In sum, the reports summarized the very same interview with respect to Carter's description of Kelley; to the extent the

descriptions, if any real discrepancy exists, reflects a variation in Trulock's characterization, not a variation in Carter's identification. Thus, the contention that the second report makes Carter's identification less believable because it shows that she understated Kelley's height by five inches, rather than three to five inches, would be easily rebutted by reference to the first report, which reflects the very same interview and description.

Carter's indication that she was "sure" that Kelley was older than twenty-six certainly could not complement the defense's arsenal beyond the firepower provided by the disclosed report. After all, the disclosed report indicated more specifically and in no uncertain terms that Carter estimated Kelley to be forty years of age at the time of the murder.

Finally, Carter's qualification that Trulock's picture of Kelley looked "something like" the man registered under that name at the motel is of no material consequence. The problems with Carter's identification were far more forcefully illustrated by her specific descriptions of a man at the motel who differed in appearance from Kelley. Defense counsel took full advantage of these inconsistencies. They would not have wanted to cross-examine Carter about the photo identification she gave Trulock. Why? Because counsel knew that the State was armed with a transcript of what Carter told the jury at Sweet's second trial--that the photograph the prosecutor was showing her was the photograph of the man named "Kelley" she met at the motel the day of the Maxcy murder. She was right: the photograph was of Kelley. Kelley, 569 So. 2d at 758. Defense counsel would not have wanted to risk the possibility that the State, on redirect, would ask Carter if she had identified a photograph of the man named "Kelley."

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varied in other regards, the disclosed report was more comprehensive than the undisclosed report.

Ultimately, the State's provision of Trulock's first report rendered any omission of the second report perfectly harmless.

d. Fingerprint Report

In the course of investigating the Maxcy murder, the Highlands County Sheriff received a "Latent Fingerprint Report," dated September 1, 1967, from the Florida Sheriffs Bureau. The report reflects that forty-eight latent finger and palm print lifts were taken from Maxcy's house and car. The report further states that the lifts were compared against the finger and palm prints of eighty-one persons, including Kelley, and that none of the lifts positively matched Kelley's prints. This report was not supplied to defense counsel.

Nevertheless, defense counsel were well aware at trial that Deputy Sheriff J.C. Murdock, a prosecution witness, had lifted several latent prints from the crime scene and sent them to the Florida Sheriffs Bureau and that none of the prints matched Kelley's.[47] Capitalizing on this knowledge, Kunstler cross-examined Murdock on this point extensively.

> Q: [C]an you tell the Jury what was done about fingerprints?
>
> A: Well, [another officer] and I lifted fingerprints in the building and also from the car. They were sent to Tallahassee Bureau of Law Enforcement for processing.

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[47] As the Rule 3.850 court found, and the Florida Supreme Court agreed, "The results of the fingerprint report were known to the defense and utilized at trial." Kelley, 569 So. 2d at 758.

Q: How many fingerprints did you find in the house?

A: I have no idea?

Q: Can you remember where you found them?

A: Yes, sir. We lifted prints out of the hallway, I believe, where [Maxcy's] wallet and keys and stuff were laying on the chest of drawers there. But I have no idea how many.

Q: What about the front door handle, for example?

A: We probably did. I don't remember the front door handle. . . . We probably did.

Q: I take it you dusted inside the house wherever you thought would be a likely place?

A: Yes, sir.

Q: Would that also be true of Mr. Maxcy's car?

A: Yes, sir.

Q: And with reference to the car, do you have any idea as you are sitting there--I know you are trying to think back eighteen years--do you have any idea how many fingerprints you lifted from the car?

A: I don't know, no, sir. There was quite a few.

Q: When you took fingerprints from the car and home, was it by dusting?

A: Yes, sir.

Q: That is the test that brings out a latent fingerprint?

A: Yes, sir.

Q: Latent[] is a print you can't see with the naked eye?

A: Right.

Q: When you got these prints, you took them off with a sticky tape, did you not?

A: Yes, sir.

Q: Where did you send them?

A: They were labeled with the location where they were taken and sent to Tallahassee.

Q: Did you ever get a report?

A: No, sir.

> Q: As you sit there, do you know whose fingerprints you found?
>
> A: To my knowledge, no, I don't. After they left here I have no idea.
>
> Q: But you know you did not received any information about any fingerprints of Mr. Kelley being found?
>
> A: To my knowledge, no.

Kunstler later emphasized this in closing argument to the jury:

> J.C. Murdock was then the deputy sheriff, and he took a lot of photographs. He lifted fingerprints, as I remember, fingerprints from Von Maxcy's car, fingerprints from the house. You know none of those prints were identified as Mr. Kelley's prints at all. . . . We don't know whose prints they were, they never told us, but we know they were not Mr. Kelley's prints. There were no prints of his in this whole situation.

The district court concluded that the fingerprint report was Brady material despite defense counsel's knowledge of the report's results. The court reasoned, "commenting that Kelley's fingerprints were nowhere to be found in the criminal investigation is not the same as being able to present a report to the jury stating such an absence of Kelley's prints." Kelley, 222 F. Supp. 2d 1357, 1366 (S.D. Fla. 2002). We infer from this statement that the district court thought that Kelley was prejudiced by his attorneys' inability to introduce the report into evidence; that is, without the report, the jury might have disregarded the comments Kunstler made in closing argument

and erroneously concluded that Kelley's prints had been found at the scene of the murder.

Of course, to have drawn such a conclusion, the jury would have had to disregard not only Kunstler's comments, but also Murdock's testimony and the fact that the State did not dispute the assertion that none of the latent finger and palm prints were Kelley's.[48] In our view, no reasonable jury would have needed the contents of the report to accept Murdock's unimpeached testimony and Kunstler's unrebutted statement that Kelley's prints were not among those lifted from the crime scene. Kunstler and Edmund must have harbored the same view. If they thought there was even the slightest chance that the jury might err, surely they would have demanded a copy of the report before cross-examining Murdock. But they made no such demand.

We also doubt the district court's implicit assumption that defense counsel would have introduced the report into evidence if it were available. If it were armed with the report, defense counsel could have tried to introduce it into evidence either: (1) in the State's case-in-chief, through the cross-examination of a prosecution witness; or (2) in Kelley's defense, after the State rested. Counsel could not, however, have introduced the report in this case through the cross-examination because none of the prosecution witnesses, including Murdock, ever saw it. Consequently, defense counsel would have had to place the report in evidence in Kelley's case.[49] In other words, instead of resting without presenting any evidence, Kelley would have had to call a witness to the stand to identify the report. By putting the

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[48] Kunstler made the first argument for the defense. The prosecutor went next. Nothing the prosecutor said to the jury would have caused it to believe that Kelley's prints were among those Murdock and the other officer had obtained.

[49] The report would have been admissible in evidence pursuant to Fla. R. Evid. 90.955, "Public Records."

report in evidence, Kelley would have deprived himself of the right to make the first and last closing argument to the jury.[50] We are not convinced that defense counsel would have forfeited this privilege to introduce cumulative evidence of a fact that the State did not dispute.

The district court suggests that if defense counsel had been given the finger and palm prints Murdock sent to the Florida Sheriffs Bureau, counsel could have had a forensics expert determine whose prints had been found. The court put it this way:

> Defense counsel's possession of the actual fingerprint report would have enabled them to make inquiries as to the comparisons of the latent lifts to other suspects. Thus, all of the information in the fingerprint report would have been material and exculpatory and the fingerprint report could have been used to "finger" another suspect.

Kelley, 222 F. Supp. 2d 1357, 1366 (S.D. Fla. 2002). The problem with the district court's suggestion is that it confuses the latent fingerprint report with the finger and palm print lifts themselves. The report reflects only a written summary of forensic research; it contains no lifts and thus no means of comparing prints found at the crime scene to the prints of other suspects. The State's nondisclosure of the report, as distinguished from the lifts, was the basis for Kelley's Brady claim. Because Kelley never succeeded in obtaining the lifts,

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[50] "[O]rdinarily, the introduction of documentary evidence by a defendant forfeits his right to make the concluding argument." Gari v. State, 364 So. 2d 766, 767 (Fla. 2d Dist. Ct. App. 1978).

he did not assert that they were withheld in violation of Brady. Instead, he assumed that they were destroyed or otherwise unavailable. Kelley's 3.850 motion and habeas petition both asserted that the unavailability of the finger and palm print lifts deprived him of due process guaranteed by the Fourteenth Amendment,[51] but the Rule 3.850 courts and the district court rejected this argument. As the district court explained, "Kelley fails to establish any animus on the part of law enforcement in their destruction of the evidence. Therefore, Kelley's Petition for Writ of Habeas Corpus as to Claim 3, destruction of evidence, is DENIED." Kelley, 238 F. Supp. 2d 1325, 1330 (S.D. Fla. 2002). In sum, the district court confused the report with the lifts themselves, and this error led the court to grant habeas relief for a claim it squarely denied. Accordingly, we disregard this aspect of the court's Brady ruling.

Finally, we must note, as did the Florida Supreme Court, Kelley, 569 So. 2d at 757, that the absence of Kelley's fingerprints is entirely consistent with the State's theory of the case. Sweet testified that Kelley had a glove on one hand. This testimony reinforces our conclusion that the absence of the fingerprint report, the results of which were known to defense counsel and argued to the jury anyway, was immaterial.

In sum, although the fingerprint report contained exculpatory information, the State obviously revealed that information to defense counsel. Defense counsel did not ask for a copy of the report during trial, and the State did not give them one. Under these circumstances, it is a close question whether the Brady rule required the State to provide the report to defense counsel, but even if it did, the record reflects no prejudice that merits habeas relief. Kelley could have suffered prejudice only if (1) the jury found Kelley guilty, in part,

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[51] This argument appears as part of claim (1) in Kelley's 3.850 motion and claim (3) in his federal habeas petition.

because it believed his prints were found at the scene of the crime; (2) defense counsel would have introduced the report into evidence had it been available; and (3) introduction of the report would have created a reasonable probability that the jury would not find Kelley guilty. We are satisfied that the jury's verdict was not tainted in that way, and we doubt that the report would have been introduced into evidence; hence, the withholding of the report did not affect the outcome of the trial.

3. Conclusion Regarding Brady Claims

Whether or not the five items the district court identified should have been disclosed to defense counsel, their effect taken individually and cumulatively could not have been legally significant to the outcome of Kelley's trial. As explained at length above, defense counsel effectively capitalized--in one way or another--on every potentially valuable argument the five items support, even though the items themselves were unavailable to counsel at the time of trial. It follows in this instance that the pretrial disclosure of the items would not have created a "reasonable probability that . . . the result of the proceeding would have been different." Bagley, 473 U.S. at 682, 105 S. Ct. at 3383. Thus, although the State ultimately prevailed in a factually challenging case, Kelley's due process rights were not offended.

V.

Conclusion

We acknowledge that this is an extraordinary case. The defendant was sentenced to death for a crime committed nearly four decades ago. The State's key witness was a reprehensible villain who literally got away with murder. Kelley's trial team included, among very capable and prominent attorneys, a disgraced and incompetent scoundrel. Notwithstanding these facts, however, our careful consideration of the law and the record demonstrates that

Kelley received a full and fair trial. As he has suffered no denial of his constitutional rights, the law requires that his conviction and sentence must stand. Consequently, we reverse the district court's decisions--that Kelley received ineffective assistance of counsel and that the State violated the Brady rule--and the court's judgment granting the writ of habeas corpus.

SO ORDERED.

APPENDIX B

WILLIAM H. KELLEY, Petitioner,
v.
HARRY SINGLETARY, Respondent.

Case No.:92-14246-CIV-ROETTGER

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

March 26, 2003, Decided

March 26, 2003, Filed

PRIOR HISTORY: Kelley v. Singletary, 238 F. Supp. 2d 1325, 2002 U.S. Dist. LEXIS 26211 (S.D. Fla., 2002)

DISPOSITION: State's motion for stay pending appeal granted.

COUNSEL: For WILLIAM H. KELLEY, petitioner: James Charles Lohman, Tallahassee, FL.

For SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, respondent: Carol M. Dittmar, Attorney General Office, Tampa, FL.

JUDGES: NORMAN C. ROETTGER, UNITED STATES DISTRICT COURT JUDGE.

OPINIONBY: NORMAN C. ROETTGER

OPINION:

ORDER ON STAY PENDING APPEAL

THIS CAUSE is before the Court upon Respondent's Motion for Stay Pending Appeal. Respondent, (the state of Florida or "State"), requests that this Court enter an Order staying the judgment in this case pending appeal in the Eleventh Circuit Court of Appeals. Petitioner ("Kelley") does not oppose the State's request for a stay pending appeal but moves this Court for Kelley's immediate release, pursuant to F. R. App. P. 23(c).[1]

On September 19, 2002, this Court granted Kelley's petition for writ of habeas corpus as to claim I ("September Order"). This Court held that respondent withheld materially exculpatory evidence. On December 30, 2002, this Court granted Kelley's petition for writ of habeas corpus as to claim II, holding that Kelley received ineffective assistance of counsel due to trial counsel's complete lack of a pretrial investigation strategy ("December Order").

On January 28, 2003, the State filed a Notice of Appeal as to the September and December Orders. The State argues that while this Court did not specify a deadline for the new trial as required in the September Order, Florida law requires that Kelley be brought to trial within 90 days of a trial court's receipt of an order granting the new trial. See Florida Rule of Criminal Procedure 3.191 (m). If this Court does not issue a stay pending appeal, the State argues, the 90 day time limit is insufficient to permit appellate review of this Court's Orders.

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[1] The rule provides that while a decision ordering the release of a prisoner is under review, the prisoner must--unless the court or judge rendering the decision. . . orders otherwise--be released on personal recognizance, with or without surety. See F. R. App. P. 23(c).

The "general standards governing stays of civil judgments should also guide courts when they must decide whether to release a habeas petitioner during the State's appeal. . ." Hilton v. Braunskill, 481 U.S. 770, 776, 95 L. Ed. 2d 724, 107 S. Ct. 2113 (1987). The standard for issuance of a stay is governed by four factors: (1) whether the stay applicant has made a strong showing that it (the State) is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. See id. A court is to consider three additional "traditional stay" factors if the habeas petitioner were to be released: (1) the possibility of flight; (2) the risk of danger to the public; and (3) the state's interest in continuing custody and rehabilitation of the petitioner while the case is pending appeal. See id. at 777.

Addressing first the likelihood of the stay applicant's success on the merits, the State briefly argues at least three issues which may warrant success on appeal, claiming (1) this Court conducted an evidentiary hearing, thereby "substituting" this Court's own judgment in place of the state courts' regarding the materiality of evidence; (2) this Court failed to provide due deference to the state court record regarding the issue of the State's withholding exculpatory evidence; (3) and this Court's finding of ineffective assistance of counsel was both improper and ignored the state court record. This Court's September Order detailed the manner in which the State failed to disclose materially exculpatory evidence and how this failure prejudiced Kelley. See Kelley v. Singletary, 222 F. Supp. 2d 1357, 1362-67 (S.D. Fla. 2002).

This Court's December Order detailed the manner in which Kelley received ineffective assistance of counsel and how trial counsels' complete lack of pretrial investigation prejudiced Kelley. See Kelley v. Singletary, 238 F. Supp. 2d 1325, 1328-29 (S.D. Fla. 2002). In light of these Orders, this

Court concludes that the State has not established the requisite "strong showing that it is likely to succeed on the merits." See Hilton 481 U.S. at 777.

The second factor to consider is whether the State will be irreparably injured absent a stay. The State argues that if no stay is issued pending appeal, the State will be unable to comply with the Florida Rules of Criminal Procedure requirement that a new trial commence within 90 days. Kelley concurs that 90 days is an insufficient period of time for appellate review at the Eleventh Circuit, but requests that he be released pursuant to F. R. App. P. 23(c). Inasmuch as the State would not be able to comply with the procedural rule absent a stay, this factor is weighted in favor of the State.

Kelley's motion for release pursuant to F. R. App. P. 23(c) addresses the third factor of whether he would be substantially injured by the issuance of the stay. Kelley would be substantially injured by the issuance of a stay since this Court has already reversed his conviction and ordered a new trial. The State argues that if Kelley were released, he would pose a high risk of flight due to his prior violent felony convictions and his dearth of ties to Florida. Rule 23(c) "undoubtedly creates a presumption of release from custody" unless "traditional stay factors tip the balance against it." Hilton 481 U.S. at 774, 777. However, in this case, the traditional stay factors do not tip the balance against the presumption of release.

First, Kelley's only previous violent conviction was in 1959. A simple reading of the sentencing phase of Kelley's trial from the transcript of the original record on appeal, illustrates that Kelley's sole prior violent felony was his conviction of robbery when he was seventeen years of age. Kelley robbed $ 114.00 and one six-pack of beer from an individual on June 6, 1959. See Original Record on Appeal, p. 956. While this Court does not view criminal conduct in a favorable light, an act occurring during Kelley's teenage years is insufficient to warrant Kelley a public threat. Further, the

State did not file a reply brief challenging Kelley's characterization as a model inmate for his eighteen years of incarceration.

If Kelley were to be released from custody pending appeal, he could be released into the custody of his brother, Robert Kelley. Robert Kelley is a 64 year old retiree with a four bedroom home and guest cottage in Tewksbury, Massachusetts.[2] He would provide William with a bedroom and his own private bathroom.[3] Robert Kelley was employed for 37 years by the Wonder Bread-Hostess Company, and the Elks state Grand Lodge Organization previously ordained him as their Elk of the Year.[4]

While Robert Kelley's residence is outside this state, several factors mitigate the likelihood of flight from future proceedings in Florida. First, Kelley is willing to make an unequivocal waiver of extradition to the state of Florida.[5] Second, Kelley has two grandchildren living in Massachusetts whom he has never met. The fact that Kelley has never met his two grandchildren persuades this Court of the strong probability that Kelley would remain in the close proximity of his immediate family.

The final traditional stay factor to consider is the State's interest in continued custody and rehabilitation of Kelley pending appeal. It is unlikely that the State would ever retry Kelley if it loses its appeal. In fact, the state attorney for Florida's 10th Judicial Circuit stated that if the Eleventh Circuit affirms the granting of the petition for writ of habeas

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[2] See Affidavit of Robert Kelley PP 2, 4.

[3] See id. at P 4.

[4] See id. at P 2 and Letter from Louis J. Connolly.

[5] See Petitioner's Opposition to Respondent's Motion for Stay Pending Appeal and Memorandum of Law, p. 5.

corpus, no new trial would occur.[6] Florida has "no way to retry Kelley. We have nothing."[7] Perhaps it is not surprising that the State would be unable to retry Kelley since the State's main witness, John Sweet, is deceased. Likewise, the public has little interest in Kelley's continued custody since he poses no danger to public safety and is not a flight risk.

The final Hilton factor requires inquiry as to where the public interest lies. Of paramount importance to the public interest is that both the State and Kelley are treated fairly. Such fairness was achieved in this Court's September and December Orders. Additionally, this Court is satisfied that Kelley is not a flight risk nor a threat to public safety. Therefore, the State has little to gain from the continued incarceration of a man this Court already determined is in custody in violation of the United States Constitution.

Upon consideration of the motion and for the reasons stated above, it is

ORDERED AND ADJUDGED that the State's Motion for Stay Pending Appeal is **GRANTED** to the extent that Florida Rule of Criminal Procedure 3.191(m) requires a retrial within 90 days. It is further

ORDERED AND ADJUDGED that William Kelley, is to be released from custody during the pendency of the appeal. Counsel for William Kelley is to provide this Court, within five days of the entry of this Order, with an unequivocal waiver of extradition as proof of Kelley's willingness to return to Florida custody if necessary. Upon Kelley's filing of this waiver of extradition, Kelley is to be

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[6] See Meg Laughlin, State Blocks Death Row Inmate's Release One Day Before Deadline, Miami Herald, Jan. 29, 2003.

[7] See id.

released into the custody of his brother Robert, who is to ensure both his safe travel to Tewksbury, Massachusetts and provide for his lodging and well being.

DONE AND ORDERED this 26 day of March, 2003.

NORMAN C. ROETTGER
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

WILLIAM H. KELLEY,

Petitioner,

v.

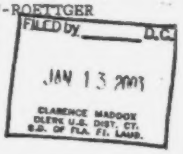
HARRY SINGLETARY,

Respondent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.:92-14246-CIV-ROETTGER

ORDER



THIS CAUSE is before the Court upon petitioner's motion for clarification. On September 19, 2002, this Court granted petitioner's petition for a writ of habeas corpus on his claim that the state failed to disclose material exculpatory evidence. On December 30, 2002, this Court held that petitioner received ineffective assistance of counsel.

Petitioner now suggests that this Court further reference the prejudice he suffered due to his attorneys' ineffective assistance of counsel. Upon consideration of the motion and the record herein, it is

ORDERED AND ADJUDGED that petitioner's motion for clarification is **DENIED.**

DONE AND ORDERED this 8 day of Jan, 2003

/s/ NORMAN C. ROETTGER
UNITED STATES DISTRICT COURT JUDGE

APPENDIX D

WILLIAM H. KELLEY, Petitioner,
v.
HARRY SINGLETARY, Respondent.

Case No.:92-14246-CIV-ROETTGER

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

December 30, 2002, Decided

SUBSEQUENT HISTORY: Stay granted by Kelley v. Singletary, 265 F. Supp. 2d 1305, 2003 U.S. Dist. LEXIS 10580 (S.D. Fla., 2003)

Reversed by Kelley v. Sec'y for the Dep't of Corr., 2004 U.S. App. LEXIS 15249 (11th Cir. Fla., July 23, 2004)

PRIOR HISTORY: Kelley v. Singletary, 222 F. Supp. 2d 1357, 2002 U.S. Dist. LEXIS 21398 (S.D. Fla., 2002)

DISPOSITION: Motion to alter or amend judgment denied. Petition for habeas corpus granted in part and denied in part..

COUNSEL: For WILLIAM H. KELLEY, petitioner: James Charles Lohman, Tallahassee, FL.

For SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, respondent: Carol M. Dittmar, Attorney General Office, Tampa, FL.

JUDGES: NORMAN C. ROETTGER, UNITED STATES DISTRICT COURT JUDGE.

OPINIONBY: NORMAN C. ROETTGER

OPINION:

ORDER

THIS CAUSE is before the Court upon Respondent's Motion to Alter or Amend Judgment, pursuant to Fed. R. Civ. P. 59(e). Respondent asks the Court to alter or amend its September 19, 2002, Order and to address the allegations in claim 2 and claim 3 of Petitioner's petition for writ of habeas corpus. Petitioner is William H. Kelley (Kelley), and Respondent is Harry I Singletary, Secretary of the Department of Corrections for the State of Florida (State). On August 31, 2000, this Court denied claims 4, 5, and 6 of Kelley's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 19, 2002, this Court granted Kelley's petition for habeas corpus due to the State's failure to disclose materially exculpatory evidence (claim 1).

Rule 59(e)

Rule 59(e) of the Federal Rules of Civil Procedure states that "any motion to alter or amend a judgment shall be filed no later that 10 days after entry of judgment." Respondent's motion was timely filed.

Though the rule fails to set forth any specific standard to justify reconsideration of a judgment, four basic grounds warrant the granting of a Rule 59(e) motion: (1) "to correct manifest errors of law or fact upon which the judgment is based"; (2) "newly available or previously unavailable evidence"; (3) to "prevent manifest unjustice"; and (4) "an intervening change in controlling law." 11 Wright, Miller, & Kane, Federal Practice and Procedure § 2810.1 (2d ed. 1995);

see also Cheney v. Cyberguard Corp., 2001 WL 1916564 (S.D. Fla. 2001). The rule is not to be used to relitigate old matters, and a reconsideration of a previous order is an extraordinary remedy to be employed sparingly. Id.; see also Barnett Bank v. FDIC, 883 F. Supp. 707, 710 (S.D. Fla. 1995) (Rule 59(e) motion must be denied absent presentation of newly discovered evidence). Only a change in the law or the facts upon which a decision is based will justify a reconsideration of a previous order. Sussman v. Salem, Saxon, & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1994).

Discussion

The State asserts that the Court "erroneously disregarded testimony from Kelley's trial" in granting Kelley's petition for habeas corpus. Additionally, the State argues that the jury "was aware of much of the information" which the State withheld from Kelley.

Upon further examination, the Court rejects the State's arguments. On pages 13-23 of its September 19, 2002, Order (September Order), the Court details several instances where exculpatory evidence was withheld from Kelley. The State has failed to provide the Court with new facts as to why its September Order is erroneous, and the Court stands by its previous judgment. Id. ("Only a change in the law, or the facts upon which a decision is based, will justify a reconsideration of a previous order"). Therefore, the State's motion to alter or amend the granting of Kelley's petition for habeas corpus pursuant to § 2254 is **Denied**.

The State, however, further alleges that the Court must settle all claims in a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Indeed, the Eleventh Circuit instructs that all claims for relief must be resolved regardless of whether habeas relief is granted or denied. Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992). The purpose of such a rule is to avoid "piecemeal litigation" which threatens to

undermine judicial economy, and treatment of several alleged constitutional violations in a single proceeding "enhances the quality of the judicial product". Id. (quotation and citation omitted). Failure to abide by the Clisby rule could result in the September Order being vacated without prejudice by the Eleventh Circuit and the case being remanded for consideration of the remaining claims. Id. at 938.

Claims 2 & 3

In claim 2, Kelley alleges egregious ineffective assistance of trial counsel and "gross dereliction of counsel's most basic and essential" duties to petitioner. The following instances are cited as examples of trial counsel's ineffective representation: (1) the unreasonable failure to investigate and to present evidence on behalf of Kelley; (2) the failure to take pretrial depositions and to seek a more fair trial venue; (3) the failure to impeach, confront, and rebut the state's case; (4) the failure to make an effective closing argument and to object to improper closing argument by the state; and (5) the failure to provide reasonably effective assistance with regard to the submission of proposed jury instructions.

To succeed on a claim for ineffective assistance, petitioner must show that "'counsel's representation fell below an objective standard of reasonableness'" and that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Chandler v. United States, 218 F.3d 1305, 1312-13 (11th Cir. 2000) (quoting Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 2473, 91 L. Ed. 2d 144 (1986)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) . The standard for counsel's performance is "'reasonableness under prevailing professional norms.'" Chandler, 218 F.3d at 1313. A lawyer's performance at trial

will not be graded by the reviewing court, but the court will ensure that the trial lawyer represented his client in a manner in which he is "constitutionally compelled." Id. (quoting Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987)).

Kelley must demonstrate, by a preponderance of evidence, ineffective assistance of counsel. Chandler, 218 F.3d at 1313. This is a challenging standard, as "judicial scrutiny of counsel's performance must be highly deferential," and the court will not second guess a lawyer's performance. Strickland, 104 S. Ct. at 2065; see also Chandler, 218 F.3d at 1314. Stated differently, Kelley's "burden of persuasion-though the presumption is not insurmountable-is a heavy one." Id. Whether a particular decision by counsel was a tactical one is a questions of fact, and the state court's resolution of the issue enjoys a strong presumption of correctness. Holsomback v. White, 133 F.3d 1382, 1386 (11th Cir. 1998). Deciphering whether a tactical decision was a reasonable decision is a question of law, reviewable de novo. Id. at 1387.

Applying the first prong of the Strickland standard, deficient attorney performance, to the issue of pretrial investigation, Kelley argues that trial counsels' reliance on disbarred attorney Harvey Brower prevented pretrial investigation, and trial preparation. A failure to investigate does not necessarily equate to deficient performance, as an attorney has "no absolute duty. . . to investigate particular facts or a certain line of defense. Id. at 1318; see also Housel v. Head, 238 F.3d 1289, 1294-95 (11th Cir. 2001) ("a failure to investigate is not a unique category of counsel omission that automatically satisfies Strickland's deficient-performance prong."). This Court must determine if the lack of pretrial investigation and pretrial preparation fall "outside the wide range of professionally competent assistance. Strickland, 104 S. Ct. at 2066.

Defense counsel delegated responsibility for all pretrial motions, investigations, and witness interviews to Harvey Brower. Brower ultimately failed to provide trial counsel with a pretrial investigation report. Worse yet, he provided trial counsel with phony witness lists and non-existent addresses: (Joint Pretrial Stipulation of Facts PP56-57). The State does not dispute Brower's shortcomings. (Respondent's Closing Memorandum p. 50).

It is surprising that trial counsel relinquished these duties to Brower since Brower's legal career garnered several blemishes in the decade prior to Kelley's trial. Brower was disbarred from the practice of law in Massachusetts in August, 1979, for defrauding one of his clients. In re: Harvey Brower, No. 79-14BD (Mass. Aug. 16, 1979). Earlier in his Massachusetts legal career, Brower was censured by its Supreme Judicial Court for fraudulent conduct in negligence cases. In re Harvey Brower, No. 29871 Law (Mass. Feb. 23, 1973). Brower was convicted in the Western District of Louisiana for unlawfully conspiring to aid and abet the crime of bail jumping. United States v. Marino, 617 F.2d 76, 78 (5th Cir. 1980).[1] In the present case, Kelley's trial attorney William Kunstler characterized Brower as a thief who "absconded" with fees without ever performing his investigatory duties. Two esteemed Massachusetts-based criminal defense lawyers testified that Brower was incapable of even performing a competent pretrial investigation for a capital murder trial. A retired attorney at the Boston hearing in this case testified that Brower had been secretly running a bookmaking operation out of the attorney witness' office. Further, this attorney testified that Brower had more interest playing in two musical bands than in any kind of legal investigation.

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[1] Apparently, Brower's Lawrence, Massachusetts office was also involved in a counterfeit bond sale conspiracy, disclosed during Brower's bail jumping trial. Marino, 617 F.2d at 81.

Given Brower's tarnished history of questionable legal strategy, it is doubtful that Brower was sufficiently adept to satisfy the following requirement under Strickland: "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. [A] decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 104 S. Ct. at 2066.

Applying the Strickland guidelines of investigation to Kelley, two facts are apparent. First, counsel did not perform reasonable investigation because the agent charged with this responsibility, Brower, proved to be inadequate. This Court has difficulty recognizing the competence of a pretrial investigator who "engaged in dishonesty, deceit and fraudulent" behavior representing one of his former clients, according to the Massachusetts Board of Bar Overseers. In re: Harvey Brower, No. 79-14BD (Mass. Aug. 16, 1979). Second, Kunstler and Edmonds could not have decided not to investigate because they were unaware of Brower's pretrial investigation (or lack thereof) until the eve of trial. At the Florida 3.85 hearing, Kunstler testified that he agreed to represent Kelley with the understanding that he would be unavailable to participate in any of the pretrial work. Kunstler stated that he was unprepared for the Kelley trial.

Based on Kunstler's own testimony, the lack of pretrial investigation was not due to "a decision. . . [made] for reasonableness in all the circumstances." Strickland, 104 S. Ct. at 2066. Rather, neither Kunstler nor Edmund made the decision not to investigate. They mistakenly assumed that Brower, the disbarred attorney/investigator, would conduct his investigation in a conscientious manner. Ultimately, however, Brower failed to perform an investigation, and his failure to present the findings of a pretrial investigation or to file any pretrial motions effectively provided Kelley with ineffective counsel. Therefore, Kelley's trial counsel was

deficient in having a disbarred attorney, lazy to a fault, resolve whether or not to conduct a pretrial investigation.

Though courts are required to lend a "heavy measure of deference to counsel's judgments," the Supreme Court has found that a "total failure to conduct pre-trial discovery" rendered trial counsel's performance deficient. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 2589, 91 L. Ed. 2d 305 (1986). In Kimmelman, the court determined that trial counsel's failure to file a timely suppression of evidence motion constituted deficient attorney performance. Trial counsel conducted no pretrial discovery, and the decision to conduct no pretrial discovery was based not on "'strategy'" but on mistaken belief that the state was required to turn over all inculpatory evidence. Id. at 2588. Similarly, trial counsel in the present case acted under the mistaken belief that Brower would perform a dutiful investigation or decide not to investigate after thoughtful consideration.

Claim 3

Petitioner claims that State's destruction of physical evidence prior to Kelley's two trials deprived him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments In 1976, the Florida State Attorney prosecuting John Sweet received a court order authorizing the destruction of physical evidence from the Von Maxcy murder. (Joint Pretrial Stipulation of Facts P93). At that point in time, the state had insufficient evidence to proceed against Kelley. (Id. at PP94-95).

In order to establish a violation of due process, Kelley must demonstrate "bad faith on the part of the police." Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988); see also United States v. Brown, 9 F.3d 907, 910 (11th Cir. 1993). In the present case, Kelley offers the affidavit of a former deputy with the Highlands County Sheriff's Office, Fred Michell, to demonstrate that the potentially exculpatory evidence was unnecessarily destroyed.

Michell was the custodian of evidence in 1976 when a "very small amount" of evidence was destroyed by the court clerk due to a lack of space in the clerk's office. Michell testifies that the sheriff's office could have accommodated the clerk's office lack of space. Additionally, Highland County built a courthouse annex in 1974, and the second floor of this annex may have been vacant from 1974-1982. Michell raises the inference that the vacant annex space could have provided the extra space for evidence required by the sheriff's office.

Michell's affidavit furnishes possibilities about what the Highland County Sheriff's Office could have done to find extra space for evidence storage, but it does nothing to furnish insight into the requisite "bad faith" necessary to establish a due process violation. Arizona, 109 S. Ct. at 337. Michell's affidavit provides little more than speculation and "what could have been done" in order to preserve the physical evidence. Kelley fails to establish any animus on the part of law enforcement in their destruction of the evidence. Therefore, Kelley's Petition for Writ of Habeas Corpus as to Claim 3, destruction of evidence, is **DENIED**.

For the reasons set forth above, the State's motion to alter or amend the granting of Kelley's petition for habeas corpus pursuant to § 2254 is **DENIED**. Upon consideration of the petition, the evidentiary hearing, the record, and because Kelley received ineffective assistance of counsel due to trial counsel's complete lack of a pretrial investigation strategy, it is

ORDERED AND ADJUDGED that the petition for habeas corpus pursuant to 28 U.S.C. § 2254 is **GRANTED**, with respect to claim 2 (in addition to this Court's previously granting claim 1) and **DENIED** with respect to claim 3.

DONE AND ORDERED this 30 day of Dec. 2002.

NORMAN C. ROETTGER
UNITED STATES DISTRICT COURT JUDGE

APPENDIX E

WILLIAM H. KELLEY, Petitioner,
v.
HARRY SINGLETARY, Secretary, Florida Department of Corrections, Respondent.

Case No.: 92-14246-CIV-ROETTGER

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

September 19, 2002, Decided

SUBSEQUENT HISTORY: Motion denied by, Writ of habeas corpus granted, in part, Writ of habeas corpus denied, in part Kelley v. Singletary, 2002 U.S. Dist. LEXIS 26211 (S.D. Fla., Dec. 30, 2002)

PRIOR HISTORY: Kelley v. Dugger, 597 So. 2d 262, 1992 Fla. LEXIS 501 (Fla., 1992)

DISPOSITION: Petition for habeas corpus granted. Petitioner's conviction reversed.

COUNSEL: For WILLIAM H. KELLEY, petitioner: James Charles Lohman, Tallahassee, FL.

For SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, respondent: Carol M. Dittmar, Attorney General Office, Tampa, FL.

JUDGES: NORMAN C. ROETTGER, UNITED STATES DISTRICT COURT JUDGE.

OPINIONBY: NORMAN C. ROETTGER

OPINION:

ORDER

THIS CAUSE is before the Court upon a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is William H. Kelley (Kelley), and Respondent is Harry Singletary, Secretary of the Department of Corrections for the State of Florida (State). This Court previously entered a partial order on August 31, 2000 denying claims 4, 5, and 6 of the petition. The Court reserved ruling on the first three claims as Kelley had requested to present more evidence in an evidentiary hearing. The Court held an evidentiary hearing in Boston, Massachusetts on April 24-25, 2001 and in Ft. Pierce, Florida on July 9, 2001. Final briefs were filed with the Court and a final argument was held on November 7, 2001 in Ft. Lauderdale, Florida.

FACTS

Irene Maxcy and John Sweet were lovers, and they planned to kill Irene's husband, Charles von Maxcy, a wealthy citrus grover and rancher from Sebring, Florida. Sweet and Irene talked for months about the murder, after which they planned to live together on Maxcy's large estate. Sweet contacted an acquaintance, William Bennett of Boston, Massachusetts. Arrangements were made, and a price was set: $ 5000 up front, and $ 15,000 after the murder.

On October 1, 1966, Sweet went to Daytona, Florida to meet Andrew von Etter. Von Etter was to do the killing, along with a partner. The next day von Etter called Sweet to tell him the partner, "William Kelley", had arrived. On October 3rd Sweet drove von Etter and "Kelley" to the estate. The alleged

killers showed Sweet the weapons they would use, knives and a revolver, which they kept in a satchel. Sweet drove back to Sebring. Charles von Maxcy was murdered that day. A couple weeks later, Sweet went to Boston to pay the $ 15,000 balance due for the murder.

Unfortunately, the murder did not signal the beginning of a blissful life on the estate for Irene Maxcy and John Sweet. Sweet wanted more money, purportedly to pay off the murder balance, and he began to harass and threaten Irene and her five-year-old daughter daily. Terrified, Irene Maxcy went to the authorities. In exchange for immunity, she implicated Sweet in the murder-for-hire scheme. Sweet was arrested in 1967, charged with first degree murder. It became known in the course of the investigation for Sweet's trial that the "triggermen" in the murder were named von Etter and "Kelley". These men were not charged at this time, however, as prosecutors felt they had insufficient evidence against them.

Irene Maxcy was the star witness for the prosecution in Sweet's first trial. Her testimony was erratic and difficult as she denied, even under the protection of immunity, that she wanted to kill her husband. She testified it was entirely Sweet's idea. She claimed to have witnessed many of the phone calls Sweet had made in arranging the murder, and she related many of the details about which Sweet had kept her informed, including the murder itself. She further testified that she gave Sweet more than $ 35,000 to help pay for the murder, and that Sweet had wanted another $ 75,000. Sweet, testifying on his own behalf, denied any involvement in the crime. The trial ended in a hung jury. Sweet was tried again in 1968. Again, Irene Maxcy testified against him, and again, Sweet denied any involvement. This time the jury agreed on a guilty verdict.

The Second District Court of Appeal of Florida reversed Sweet's conviction. Sweet v. State, 235 So. 2d 40 (Fla. 2d D.C.A. 1970). The court of appeal held that the trial court

erred in not admitting Irene Maxcy's testimony that she had been having a romantic relationship with the case agent. The case agent denied having this relationship. But these conflicting accounts, in conjunction with the unseemliness of the relationship to begin with, were found to undermine the credibility of both Irene Maxcy and the case agent.[1] As this testimony formed the vital foundation of the case, the court of appeal, one judge dissenting, ordered a reversal. See id. at 42.

Sweet was not tried a third time. By 1971 the State had given up on the case. Five years later, in 1976, most of the physical evidence was destroyed at the behest of the clerk of court, who had been charged with storing the case file and the evidence. The State allowed the destruction of the physical evidence -- which included a bullet, a bloody bedsheet, and a shred of the victim's shirt -- on the basis that the case "had been disposed of."

By 1981 John Sweet was facing criminal charges in Massachusetts of prostitution, narcotics distribution, arson, bribery, counterfeiting, loan sharking, and hijacking. With authorities closing in on him Sweet went to them first. His plan was to win immunity in exchange for information he had on the murder of Charles von Maxcy. William Kelley was the target, as Sweet implicated him as one of the murderers.[2] The Massachusetts authorities brought Sweet to Florida where Sweet gave authorities there his confession. The next day Sweet was awarded immunity in Massachusetts.

A Florida grand jury indicted William Kelley on first degree murder charges in December, 1981 -- some fifteen years after the murder. Kelley was arrested in 1983. His first trial, like Sweet's, ended in a hung jury and a mistrial. Kelley

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[1] Irene Maxcy was indeed convicted of perjury in 1971 in connection with her testimony in the Sweet trial. She was sentenced to life imprisonment, but served only four and one-half years before being released on parole.

[2] By 1981 von Etter and Bennett were dead.

was retried in March of 1984. For both trials the primary evidence against Kelley was Sweet's testimony. Again, Sweet recounted the details of the murder, how it was arranged, and who was involved. Corroborating Sweet's accusations, the State presented evidence that a "Mr. and Mrs. William Kelley" had registered at the Daytona Inn the night before the murder. Also, the jury heard from Abe Namia, a private investigator hired by Sweet's attorney shortly after Sweet's 1967 arrest. Namia testified about statements Sweet had purportedly made which incriminated Kelley. The jury returned a guilty verdict against Kelley in March, 1984.

The jury then reconvened to hear evidence pertaining to Kelley's sentence. After weighing the aggravating factors against the mitigating factors suggested by this evidence, the jury recommended death. In April, the presiding judge followed the recommendation, and formally sentenced Kelley to death. The judge found three statutory aggravating circumstances justifying the sentence: prior conviction of a prior felony, homicide committed for pecuniary gain, and homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. See Fla. Stat. Ch. 921.141. The court indicated one mitigating factor: Kelley was the only one, out of at least five, to receive punishment for Charles von Maxcy's murder.

APPEALS

On direct appeal to the Supreme Court of Florida, Kelley argued eight issues, challenging both his conviction and his death sentence. See Kelley v. State of Florida, 486 So. 2d 578 (Fla. 1986). Kelley claimed the destruction of evidence irreparably prejudiced him, the testimony of the private investigator, Abe Namia, was improperly admitted hearsay, the trial court erred in not answering a jury question during its deliberation, the trial court erred in allowing the jurors to take notes, certain post-arrest statements should not have been admitted, and the trial judge erred giving non-pattern instructions to the jury after the jury reported it was

deadlocked. The Supreme Court of Florida rejected each of these claims. It did not consider Kelley's ineffective assistance of counsel claim, as this was Kelley's direct appeal, and the court further rejected Kelley's attack on his death sentence as "without merit." Accordingly, the Supreme Court of Florida affirmed Kelley's conviction and sentence. See id. at 580-86. Kelley sought certiorari in the United States Supreme Court; the Court denied this petition on October 6, 1986. See Kelley v. Florida, 479 U.S. 871, 93 L. Ed. 2d 169, 107 S. Ct. 244 (1986).

Kelley filed his post-conviction relief motion to vacate the judgment and sentence pursuant to rule 3.850 of the Florida Rules of Criminal Procedure in the Tenth Judicial Circuit of Florida in November, 1987. After a hearing the court denied the motion in August, 1988; Kelley appealed the denial, again to the Supreme Court of Florida. See Kelley v. State, 569 So. 2d 754 (Fla. 1990). As his first point of collateral relief, Kelley repeated his argument that the destruction of evidence impaired his due process rights. The court rejected this claim on much the same grounds as it did on direct appeal. The court denied two other claims: the purported improper contact by the prosecution of a witness and an improper closing argument, as procedurally barred. Further, Kelley argued more extensively that there were Brady violations, and averred a detailed list of supposed instances of ineffective assistance of counsel. The Supreme Court of Florida deferred entirely to the trial court's order on all of these claims, and concluded there was neither a Brady violation, nor ineffective assistance of counsel. Kelley's other claims of juror misconduct, and error in the trial judge's decision not to recuse himself from the case, were likewise found unavailing. See id. at 755-62. The Supreme Court of Florida affirmed the trial court's denial of Kelley's motion to vacate the judgment and sentence on September 6, 1990.

Kelley filed a petition of habeas corpus in the Supreme Court of Florida in April, 1991. Kelley raised another claim

of ineffective assistance of counsel, this time directed at his appellate counsel. Kelley further attacked the constitutionality of applying Florida's death penalty statute to this case on ex post facto grounds, and challenged the aggravating factors found in this case as "overbroad." The Supreme Court of Florida denied Kelley's petition on March 12, 1992. Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992).

FEDERAL HABEAS CORPUS PETITION

Kelley filed the instant petition for habeas corpus in this court, pursuant to 28 U.S.C. § 2254, on October 9, 1992. Kelley alleges six claims. The first presents prosecutorial misconduct, including suppression of exculpatory evidence, and making false statements to the jury. Claim two alleges ineffective assistance of counsel, as defense counsel failed to investigate the case, depose witnesses, and perform other basic functions. Third, Kelley claims the destruction of evidence violated his constitutional rights. Claims 4, 5, and 6 were denied by this Court on August 31, 2000.

THE AEDPA

One preliminary matter involves the law which this court should apply to Kelley's petition. The habeas corpus statute under which Kelley filed this action underwent significant changes in 1996, pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA). Substantively, the amended § 2254 provides for much greater deference to the state court adjudication of claims, and further refines the presumption of correctness federal courts must accord factual determinations in state court. See 28 U.S.C. § 2254(d), (e). With regards to Kelley's petition, the United States Supreme Court has held that in general, except for select provisions that Congress explicitly made retroactive, the amendments apply only to cases filed after the effective date of the amended statute. See Lindh v. Murphy, 521 U.S. 320, 326-37, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997). As Kelley's petition was filed in 1992, and does not concern the select retroactive provisions,

this court must apply the law as it was prior to the 1996 amendments.

ANALYSIS

Pursuant to the Supreme Court's ruling in Lindh, this court must analyze Kelley's claim under the pre-AEDPA standard of review for habeas petitions. Under the old law, a petition for a writ of habeas corpus cannot be granted unless Kelley can establish that he is being held in violation of the United States Constitution or the laws or treaties of the United States. 28 U.S.C. § 2254(a). In his petition for writ of habeas corpus, Kelley claims a Brady violation. Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Because a Brady claim is in fact a due process claim, it is clear that this Court is empowered under the appropriate circumstances to grant federal habeas corpus relief "on the ground that [the petitioner] is in custody in violation of the Constitution ... of the United States." 28 U.S.C. § 2254(a). The Brady rule does not require a prosecutor to "deliver his entire file to defense counsel," but only to disclose those items which are material to the defendant's guilt or punishment. United States v. Bagley, 473 U.S. 667, 675, 87 L. Ed. 2d 481, 105 S. Ct. 3375, (1985); accord, e.g., Kyles v. Whitley, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) ("We have never held that the Constitution demands an open file policy.")

"There are three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281, 144 L. Ed. 2d 286, 119 S. Ct. 1936 at 1936-82 (1999). The second component (suppression) is not at issue in this case, since the State does not dispute that the evidence in question was not produced to Kelley's counsel before trial. The remaining two issues depend on whether the undisclosed information was material and exculpatory.

The United States Supreme Court has emphasized four aspects of materiality in Kyles v. Whitley. First,

> although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant) ... Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial. " ...
>
> The second aspect of Bagley materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the

> whole case in such a different light as to undermine confidence in the verdict. [footnote omitted] ...
>
> Third ... once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review ...
>
> The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item. [footnote omitted].

Kyles v. Whitley, 514 U.S. at 434-36 (most citations and footnotes omitted).

It is against this legal backdrop that Kelley's trial must be viewed. Petitioner made his Brady violation claims at the state level both in a November 1987 motion for post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure and again with the Florida Supreme Court. The Florida Supreme Court, quoting the trial court's order, issued one paragraph explanations for each exculpatory and impeachment evidence that the state failed to turn over to the defense. Therefore, the record before this Court contains only the trial court's reasoning, analysis, findings of fact, and legal bases for the denial of Kelley's Brady violation claim.

The trial court, quoted by the Florida Supreme Court, "briefly summarized" each piece of evidence for its likely individual effect on the outcome of the trial, but did not analyze the evidence collectively. This piecemeal approach is contrary to the progeny of Brady. Therefore, this court must independently consider the merits of Kelley's claims. Kyles, supra.

Kelley claims the State of Florida deprived defense counsel of valuable impeachment evidence by suppressing

evidence of Sweet's true immunity deal, the transcript of John Sweet's first trial, a police report which recorded Kaye Carter's (the motel clerk) inability to positively identify a picture of Kelley shortly after the murder, and a latent fingerprint report. Kelley made numerous pretrial requests for such materials, including detailed motions, legal memoranda, and substantial correspondence. These undisclosed exculpatory materials were not provided to Kelley prior to his trial and were only furnished during his post conviction 3.850 proceedings, pursuant to his request for prosecution and investigative files under Florida's "Public Records Act," Chapter 119, Fla. Stat. Kelley's trial attorneys were not aware of the existence of these material exculpatory documents and records until they were turned over by the prosecution at the 3.850 hearing.

In Kelley v. State of Florida, Justice Adkins of the Florida Supreme Court wrote "we wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 582. This case presents many incidences of prosecutorial misconduct. Hardy Pickard, Assistant State Attorney, has a habit of failing to turn over exculpatory and impeachment evidence.[3]

A key piece of evidence withheld from Kelley by Assistant State Attorney Pickard was information concerning Sweet's Massachusetts immunity agreement. The State withheld two documents that proved Sweet had a deal for immunity on numerous serious felonies in Massachusetts

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[3] In another capital murder case, Circuit Judge Barbara Fleischer, sitting by designation by the Florida Supreme Court as a temporary judge of the Tenth Circuit, ordered a new trial for a defendant because Assistant State Attorney Hardy Pickard withheld impeachment materials from the defense. State of Florida v. Melendez, No: CF-84-1016A2-XX (Tenth Judicial Circuit of Florida), slip op., filed December 5, 2001.

which were inextricably connected to Sweet's implication of Kelley in the murder of Maxcy. The first suppressed document revealed that Sweet was not awarded immunity from Massachusetts until March 13, 1981 -- after an off-the-record debriefing of Sweet and negotiations with Massachusetts officials concerning the Maxcy murder and numerous Massachusetts crimes. (Order of Immunity dated March 13, 1981).

In addition, the State and Pickard failed to disclose to defense counsel Agent Joe Mitchell's Florida Department of Law Enforcement Investigative Report dated February 21, 1981. This report was withheld from Kelley until years after his trial. The document describes a meeting on March 6, 1981 at Pickard's office in Bartow, Florida. The document describes the sequence of events and the descriptions of the inter-state meetings and discussions with Sweet and his attorneys. In the report, "Major Regan had indicated that Sweet was willing to testify in behalf of the State of Florida, providing he could be granted immunity in the 1966 case." (Florida Department of Law Enforcement, Investigative Report dated February 21, 1981, p. 1). The document is important because what is contained in the document is vastly at odds with the state's representation during the trial. During the State's closing argument, Pickard argued to the jury that Sweet did not have to give Kelley to the authorities in order to get immunity. However, it is clear from the withheld report that Sweet was willing to testify if he could be granted immunity. (Emphasis supplied).

As in Kelley's first murder trial, the materiality of Sweet's deal is evident because the jury in the second trial sent the trial court the following question during its deliberation:

> As the Jury, we would like to know if John J. Sweet received immunity in Florida for the first degree murder and perjury before he gave information on the Maxcy trial, and if he had

anything to gain by his testimony. (Excerpt from Kelley's second trial transcript, p. 925).

Clearly, the jury was vitally interested in Sweet's motivation for testifying as he did. If Sweet had nothing to gain from his testimony, his testimony would be more credible. On the other hand, if Sweet did have anything to gain by his testimony, his testimony would be more suspect.

If counsel had been provided a copy of the report, counsel would have been placed in a better situation to cross-examine Sweet. See Stano v. Dugger, 901 F.2d 898, 903 (11th Cir. 1990)(en banc)(noting that the defendant's burden to prove the materiality of suppressed impeachment evidence was lightened in view of the fact that a previous jury had been unable to find the defendant guilty). Worse still, during the jury's deliberations the prosecutor, Pickard, to this question argued successfully to the trial judge that he not read Sweet's testimony back to the jury.[4] The trial judge brought the jury back into the courtroom and explained that the court could not answer the question and could not comment on the evidence.

Disclosure of the memo to Kelley's counsel was required under Brady. As in this case, where a prosecution depends almost entirely on the testimony of one witness, without whom there would be no indictment or evidence to carry the case to the jury, the reliability and credibility of that witness is a monumentally important issue and may well have been determinative of guilt or innocence of the defendant. Giglio v. United States, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 at 763-55 (1972). Evidence of any understanding or agreement as to a future prosecution would be relevant to the credibility of that witness and a jury is entitled to know of it, especially when they specifically ask about it during their

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[4] At Kelley's first trial, when confronted with a remarkably similar question, the trial court had all of Sweet's testimony re-read to the jury.

deliberations. Id. Kelley, defense counsel, and the jury should have been informed of the manner in which Sweet was granted immunity in Florida and Massachusetts, and the manner in which both states worked together to secure Sweet's cooperation. The jury's question to the trial court shows that the jury was very concerned with this matter and full disclosure of the immunity could well have changed the outcome of Kelley's trial.

The second piece of evidence withheld from Kelley is the transcript of Sweet's first trial from 1967. Kelley's attorneys made numerous pretrial requests for the transcripts of Sweet's first trial from 1967. The state court ordered the state to provide the defense with a copy of Sweet's first trial.[5] However, the transcript was never provided to Kelley prior to his murder trial. The transcript would have assisted Kelley in a number of ways. The transcript contained almost three hundred pages of Sweet's testimony. This prior testimony would have been valuable in impeaching Sweet.

The first trial transcript was material because it would have provided sworn testimony for impeachment of Sweet, including whether he lied about Irene Maxcy's sexual conduct to discredit her and save himself and whether he told Irene Maxcy that he did not know a "William Kelley".

At Sweet's first trial, Sweet testified that Irene Maxcy (1) had a sexual affair with a young boy (Excerpt from Sweet's first trial transcript, p. 1075-78); (2) arranged for, in Sweet's presence, and then engaged in sex with a friend of Sweet's (Id. at 1079-82); and (3) engaged in sex with a dog, purchased for her by Sweet (Id. at 1083-87). The jury would have thought carefully about the credibility of a man who made such allegations about a woman he claimed to love.

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[5] On June 29, 1983, Circuit Court Judge J. McDonald, who was later appointed to the Florida Supreme Court and recused himself from Kelley's appeal to the Florida Supreme Court, granted Kelley's Motion for Copies of Sweet's first trial transcripts.

Next, Sweet's first trial transcript contained testimony of important tape-recorded telephone conversations between Irene Maxcy and Sweet. In Sweet's first trial, Sweet testified that Irene Maxcy assured him that the telephone was not bugged and that he believed her (Id. at 828-29, 846). Irene Maxcy, who was being urged repeatedly by investigators to obtain a statement from Sweet (Id. at 139), begged Sweet to work a deal with the police by framing someone in the Maxcy murder (Id. at 829). Irene Maxcy suggested names, one of which was "William Kelley" (Id. at 829, 1129). Sweet replied that he did not know a "William Kelley (Id.). This exculpatory statement did not come out at the second Sweet trial. Kelley's jury would have had a much stronger doubt that Sweet was telling the truth if defense counsel had impeached Sweet with the information of not knowing a "William Kelley" which was only available from Sweet's first trial transcript.

Assistant State Attorney Pickard's failure to turn over Sweet's first trial transcript deprived Kelley and his counsel of material exculpatory evidence. Access to the transcript of Sweet's first trial could reasonably have changed the outcome of Kelley's trial. Without the transcript defense counsel was inhibited from full cross-examination of the veracity of the state's single key prosecution witness, Sweet. Kelley's trial was dependent almost entirely upon the testimony of Sweet. Sweet's first trial transcript was impeachment evidence which Kelley's counsel could have used to discredit Sweet or question his veracity. Because the state's case stood or fell on Sweet's credibility, Kelley had a right to impeach Sweet fully. Kelley was unable to impeach Sweet fully because Assistant State Attorney Pickard failed to disclose Sweet's first trial transcript. The failure to disclose the transcript served to eliminate from his trial impeachment evidence that was crucial to the jury's assessment of Sweet's reliability and credibility as a witness. Had the transcript been available to

Kelley and his counsel there is a reasonable likelihood that the outcome of Kelley's trial would have been different.

Third, the state withheld a second police report, perhaps more critical to Kelley, concerning the description of the "William Kelley" Kaye Carter met at the Daytona Inn Motel. The state did provide a report to defense counsel during pretrial. In the disclosed report, Carter described "William Kelley" at the hotel:

> ... as being about 40, 6' to 6'2" tall, medium build, dark hair, (kind of curly) with a deep husky voice. (Florida Sheriffs Bureau Report dated March 17, 1967).

In the withheld report Carter described "William Kelley":

> ... as being about 40, 6' medium build, dark hair, kind of curly, husky voice. This picture of William Harold Kelley looks something like him although she is sure that he was older than the 26 years on his description. (Florida Sheriffs Bureau Report dated March 18, 1967).

The description given of "William Kelley" by Carter in both reports is substantially different from Petitioner Kelley.[6]

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[6] Carter's description is particularly significant in that the petitioner and respondent have stipulated that in 1966 Steve Busias was in his mid-to later thirties but looked older, was about 6' to 6'2", had dark curly hair, and had a deep husky voice.

In hearings before this Court, Charles Busias, son of Steve Busias, testified that his father had come to Florida about the time of the murder and shortly after returned to Boston and had enough cash to buy a car and a lounge.

Petitioner Kelley on October 3, 1966 was a young looking 23-year old, with straight blond hair, and was at least six feet five inches tall.

There are three exculpatory evidence points in the undisclosed report. First, in the undisclosed report, Kelley is described as six feet tall, as opposed to six feet to six feet two inches in the disclosed report. Since Petitioner Kelley is at least six feet five inches tall, the three to five inch difference between the two reports is more probative that Carter's "William Kelley" and the Petitioner Kelley were two different individuals.

Second, Carter was "sure" that Kelley was older than 26 years old. On October 3, 1966 Kelley was twenty-three years old and therefore Carter would be even more sure that he was older than twenty-three. (Emphasis supplied).

And third, it appears there was an attempted photo identification by Carter. Carter's statement that the picture looked "something like" someone is not a positive identification, especially when Carter was "sure" that "William Kelley" was older. Kelley was entitled to know of this failed identification. Clearly, if defense counsel had been in possession of the undisclosed police report, counsel would have been in a better position to cross-examine Carter concerning the actual negative photographic identification, something far more exculpatory than the information contained in the disclosed report. The suppression of the report violated Kelley's constitution right and prejudiced his defense.

Lastly, the state withheld a fingerprint report. (Florida Sheriff's Bureau Latent Fingerprint Report dated September 1, 1967). The report contained the result of comparing latent

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Another witness, Hobart Willis, testified in the Boston hearing that Steve Busias admitted to Maxcy's murder. In Willis' affidavit, Willis stated Steve Busias admitted also to having von Etter killed.

lifts from the Maxcy house and car to various persons. Kelley's prints did not match any of the lifted fingerprints. The trial court concluded that the defense counsel was aware of the lifting of the fingerprints by the comments counsel made during trial. However, commenting that Kelley's fingerprints were nowhere to be found in the criminal investigation is not the same as being able to present a report to the jury stating such an absence of Kelley's prints. Defense counsel's possession of the actual fingerprint report would have enabled them to make inquiries as to the comparisons of the latent lifts to other suspects. Thus, all of the information in the fingerprint report would have been material and exculpatory and the fingerprint report could have been used to "finger" another suspect.

The Court finds that the Florida Supreme Court improperly concluded that "there was no Brady violation" by the State of Florida's depriving defense counsel of valuable impeachment evidence. While the Florida Supreme Court recited the correct law, it does not appear that it properly applied that law to the facts of the case when it stated "even if the defense had had in its possession the items it claimed it should have had, it is clear that the result of the trial would not have probably been different." Kelley v. State, 569 So. 2d at 761.

The Florida Supreme Court's opinion includes references stating that certain evidence was not material. This suggests that "cumulative materiality" was not the touchstone of the Florida Supreme Court's opinion but rather it was a series of independent materiality evaluations, contrary to the requirements of Bagley. See Kyles v. Whitley, 514 U.S. at 436. Disclosure of the suppressed evidence to competent counsel would have made a different result much more probable. The essence of the State's case was the testimony of Sweet. Disclosure of his immunity and transcript from his first trial would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.

For the reasons set forth above, upon consideration of the petition, the evidentiary hearing, the record, and because the state failed to disclose materially exculpatory evidence as required by Brady and its progeny, thus undermining confidence in the outcome of Kelley's trial.

Therefore, it is ORDERED AND ADJUDGED that the petition for habeas corpus pursuant to 28 U.S.C. § 2254 is GRANTED. Petitioner's conviction is REVERSED, and a new trial is ordered.[7]

DONE AND ORDERED this 19 day of Sept, 2002.

NORMAN C. ROETTGER

UNITED STATES DISTRICT COURT JUDGE

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[7] The undersigned judge is not a foe of capital punishment and has granted only three § 2254's in thirty-plus years on the District Court bench.

APPENDIX F

WILLIAM H. KELLEY, Petitioner,
v.
RICHARD L. DUGGER, etc., Respondent.

No. 77,708

SUPREME COURT OF FLORIDA

March 12, 1992, Decided

SUBSEQUENT HISTORY:

Rehearing Denied May 26, 1992. Released for Publication May 26, 1992.

PRIOR HISTORY: Original Proceeding - Habeas Corpus

COUNSEL: Larry Helm Spalding, Capital Collateral Representative, Tallahassee, Florida; Billy H. Nolas and Julie D. Naylor, Ocala, Florida; and Barry P. Wilson of Zalkind & Sheketoff, Boston, Massachusetts, for Petitioner.

Robert A. Butterworth, Attorney General and Robert J. Krauss, Assistant Attorney General, Tampa, Florida, for Respondent.

JUDGES: SHAW, C.J. and OVERTON, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur. McDONALD, J., recused.

OPINIONBY: PER CURIAM

OPINION: PER CURIAM.

William H. Kelley, a prisoner under sentence of death, petitions this Court for a writ of habeas corpus. We have jurisdiction under article V, section 3(b)(9) of the Florida Constitution.

Kelley was convicted of first-degree murder for the 1966 contract killing of Charles Von Maxcy. Kelley was hired to kill Maxcy by Mrs. Maxcy's lover, John Sweet. The trial court followed the jury's recommendation and sentenced Kelley to death. This Court affirmed the conviction and sentence on direct appeal. Kelley v. State, 486 So. 2d 578 (Fla.), cert. denied, 479 U.S. 871, 93 L. Ed. 2d 169, 107 S. Ct. 244 (1986). His subsequent petition for relief pursuant to Florida Rule of Criminal Procedure 3.850 was denied by the circuit court after an evidentiary hearing, and this Court affirmed. Kelley v. State, 569 So. 2d 754 (Fla. 1990).

Kelley raises the following claims in this petition: (1) his appellate counsel was ineffective; (2) the application of the death penalty statute to this crime is ex post facto; and (3) the aggravating factors of pecuniary gain and cold, calculated, and premeditated are overbroad.

We first address Kelley's claim of ineffective assistance. In evaluating this type of claim, this Court must determine "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986),

cert. denied, 480 U.S. 951, 94 L. Ed. 2d 801, 107 S. Ct. 1617 (1987).

Kelley first claims that his appellate counsel was ineffective for failing to argue that the prosecutor made several improper comments during closing argument.[1] None of these comments were objected to at trial. Appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. See e.g., Roberts v. State, 568 So. 2d 1255, 1261 (Fla. 1990); Suarez v. Dugger, 527 So. 2d 190, 193 (Fla. 1988); Bertolotti v. Dugger, 514 So. 2d 1095, 1097 (Fla. 1987).

Kelley argues that trial counsel failed to object because the grounds were unknown to him at the time due to the State's failure to disclose material exculpatory evidence. We fail to see the relevance of the reason for trial counsel's failure to object. The fact remains that these claims were not preserved at trial, for whatever reason, and appellate counsel therefore acted reasonably in not including these claims on direct appeal.

We reject Kelley's argument that this Court's previous holding that this claim should have been raised on direct appeal is dispositive. See Kelley, 569 So. 2d at 756. The fact that we held that the claim was not appropriately raised in a motion for postconviction relief, and instead should have been raised on direct appeal, does not imply in any way that appellate counsel necessarily was ineffective for failing to raise it at that time. As we stated previously, appellate counsel

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[1] Kelly contends that the following arguments were improper: (1) that Kaye Carter, a State witness, could not be expected to be able to identify Kelley seventeen years after spending a few hours with him; (2) that it was very unlikely that Kelley's information about the homicide was gleaned from newspaper articles; and (3) that Sweet did not have to "give them [the authorities] Kelly" in order to get immunity for Massachusetts crimes.

was not ineffective because the claim was already barred by trial counsel's failure to object.

Furthermore, even if this claim had been raised on direct appeal, we would have found it to be without merit.[2] All of Kelley's arguments in this petition are refuted by this Court's decision on his 3.850 appeal.[3] Basically, Kelley's argument on this issue is an attempt to relitigate his 3.850 motion. We refuse to revisit these issues simply because they are now raised under the guise of an ineffective assistance claim.

Kelley's next asserted omission on the part of appellate counsel relates to alleged misconduct by the state attorney in coaching a witness during cross-examination. Abe Namia, a private detective who was originally hired by Sweet's defense

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[2] We therefore also reject Kelly's claim that these comments constituted fundamental error.

[3] As to Kaye Carter's identification, although trial counsel did not know that Carter had been unable to identify Kelley's photogragh during the police investigation, the fact that she was able to identify his picture at Sweet's second trial negates Kelley's argument that the prosecutor attempted to mislead the jury by stating that it was the passage of time which caused Carter to be unable to remember Kelley during his trial. See Kelley v. State, 569 So. 2d 754, 757-58 (Fla. 1990). As to the newspaper articles, although trial counsel was not specifically aware that the prosecutor had been contacted by a reporter, counsel was aware of the possibility of the existence of articles, as they were mentioned in cross-examination, and could have discovered them. See id. at 759-60. The prosecutor could reasonably comment on the unlikelihood of Kelley's knowledge being acquired through the media since there was no evidence introduced that Kelley had actually read any of these articles. As to Sweet's immunity, there was "no evidence to support the inference that Sweet's Massachusetts immunity was contingent upon his testimony in [Kelley's] Florida trial," and the prosecutor could properly comment on that fact. See id. at 758.

attorney,[4] testified that in 1967 Sweet admitted to him that he had hired Kelley to kill Maxcy. On cross-examination, the defense attempted to show that Namia was making up this story, presumably to collect reward money. Namia was confronted with reports he had made during his investigation, none of which mentioned Sweet's confession. At this point, the prosecutor asked that a recess be taken in order to allow him to review these reports. Kelley now claims that appellate counsel was ineffective for failing to argue on appeal that during this time the State improperly consulted with the witness and helped him to prepare for cross-examination. He bases this claim on the prosecutor's statements after the recess that he and Namia had conferred and Namia identified the papers as reports he had prepared, although he did not know whether there were additional reports. Again, there was no objection by trial counsel at this time, and the issue of any unethical preparation of the witness was therefore not preserved for review. Furthermore, Kelley has made no showing that the prosecutor advised Namia as to how to testify, but only that he examined reports that had not previously been disclosed to the State and that were now being used to impeach its witness. There is no reason to believe that any misconduct occurred during the recess. Since this claim was both unpreserved and unsubstantiated, counsel cannot have been ineffective for failing to raise it.

Kelley next argues that his appellate counsel was ineffective for failing to argue that his robbery conviction was too remote in time to be considered in aggravation. Even if this claim had been raised on direct appeal, it would have been rejected. This Court has subsequently held that because the death penalty statute is silent as to the time or place of the previous conviction, even a conviction remote in time may

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[4] Sweet was tried twice for the Maxcy murder. The first trial resulted in a mistrial, and the second ended in a conviction which was overturned on appeal.

properly be considered as aggravating. Thompson v. State, 553 So. 2d 153, 156 (Fla. 1989), cert. denied, 110 S. Ct. 2194 (1990).

Finally, Kelley claims that his appellate counsel should have argued that the jury instructions improperly shifted the burden of proof to Kelley to prove that life was the appropriate punishment. Again, trial counsel did not preserve this issue for appeal by objecting. We also note that the instructions were not erroneous. See Bertolotti v. Dugger, 883 F.2d 1503, 1524-25 (11th Cir. 1989), cert. denied, 111 L. Ed. 2d 804, 110 S. Ct. 3296 (1990).

We therefore conclude that Kelley has shown no basis for a finding that the performance of his appellate counsel was deficient in any manner, or that any alleged deficiency was prejudicial, and we reject his ineffectiveness claim.

We turn now to Kelley's argument that the application of the death penalty statute to a crime committed before its enactment in its present state is ex post facto. Although this claim was specifically rejected by the Supreme Court in Dobbert v. Florida, 432 U.S. 282, 53 L. Ed. 2d 344, 97 S. Ct. 2290 (1977), Kelley argues that the issue should be reconsidered because Dobbert has been overruled by Miller v. Florida, 482 U.S. 423, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987).[5]

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[5] In Miller, the Court found that a change in the sentencing guidelines which increased the presumptive sentence for the defendant's crime was a substantive change which was more onerous to the defendant and therefore violated the ex post facto clause as applied to crimes committed before the change. Miller v. Florida, 482 U.S. 423, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987). In contrast, the Court in Dobbert found that a change in the death penalty statute was a procedural change which was not onerous to the defendant; the change in sentencing procedures altered the method employed to determine the appropriate sentence, but did

The Miller decision did not change the ex post facto analysis, as Kelley contends, nor did it in any way imply that Dobbert was no longer good law. Indeed, the Court in Miller referred to Dobbert several times as an example of a statutory change which did not violate ex post facto standards. Accordingly, we reject Kelley's argument that the ex post facto issue should be revisited.

Finally, Kelley argues that the aggravating factors of pecuniary gain and cold, calculated, and premeditated[6] are improperly and overbroadly employed. Kelley bases this claim on Maynard v. Cartwright, 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988), decided after the direct appeal in this case. This Court has rejected this claim in other cases, and we summarily reject it here as well. See, e.g., Brown v. State, 565 So. 2d 304, 308 (Fla.), cert. denied, 112 L. Ed. 2d 547, 111 S. Ct. 537 (1990); Jones v. Dugger, 533 So. 2d 290, 292-93 (Fla. 1988).

For the foregoing reasons, Kelley's petition for a writ of habeas corpus is denied.

It is so ordered.

SHAW, C.J. and OVERTON, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

McDONALD, J., recused.

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not change the quantum of punishment. Dobbert v. Florida, 432 U.S. 282, 294, 53 L. Ed. 2d 344, 97 S. Ct. 2290 (1977).

[6] § 921.141(5)(f), (i), Fla. Stat. (1983).

APPENDIX G

WILLIAM H. KELLEY, Appellant,
v.
STATE OF FLORIDA, Appellee

No. 73,088

Supreme Court of Florida

September 6, 1990

SUBSEQUENT HISTORY:

Released for Publication December 10, 1990. Rehearing Denied December 10, 1990. Writ of habeas corpus denied Kelley v. Dugger, 597 So. 2d 262, 1992 Fla. LEXIS 501 (Fla., 1992)

PRIOR HISTORY: An Appeal from the Circuit Court in and for Highlands County, E. Randolph Bentley, Judge - Case No. 81-535. Kelley v. Florida, 479 U.S. 871, 93 L. Ed. 2d 169, 107 S. Ct. 244, 1986 U.S. LEXIS 4148, 55 U.S.L.W. 3236 (1986)

COUNSEL:

Larry Helm Spalding, Capital Collateral Representative and Billy H. Nolas, Chief Assistant CCR, Office of the Capital Collateral Representative, Tallahassee, Florida; and Barry Wilson and Maxine Sushelsky, Boston, Massachusetts, for Appellant.

Robert A. Butterworth, Attorney General and Robert J. Krauss, Assistant Attorney General, Tampa, Florida, for Appellee.

JUDGES:

Shaw, C.J., and Overton, Ehrlich and Grimes, JJ., concur. Barkett and Kogan, JJ., concur in result only. McDonald, J., recused.

OPINIONBY:

PER CURIAM

OPINION:

William Kelley appeals the trial court's denial of his motion for postconviction relief filed pursuant to rule 3.850, Florida Rules of Criminal Procedure. This Court previously affirmed Kelley's conviction and death sentence for the 1966 murder of Charles Von Maxcy. Kelley v. State, 486 So.2d 578 (Fla.), cert. denied, 479 U.S. 871, 107 S. Ct. 244, 93 L. Ed. 2d 169 (1986). We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

The trial judge summarily denied several of Kelley's claims but conducted an evidentiary hearing on the claim that the prosecution suppressed evidence favorable to the defendant and the contention that the defendant was denied effective assistance of counsel.

Kelley first argues that the state's destruction of material evidence prior to his trial deprived him of his constitutional rights. In the prior appeal, this Court explained that because the case involving Maxcy's death had been closed for many years, the state obtained an order permitting the destruction of evidence. Several years later, the state initiated the prosecution of Kelley when new evidence came to light. This Court concluded that the state had not been negligent in causing the destruction of evidence and further held that the

destruction of the evidence in question did not prejudice Kelley's case.

Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley. Further, in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed. The state was not at fault in the destruction of the evidence. Kelley, 486 So.2d at 581. The destruction of evidence in this case did not deprive Kelley of due process of law. See Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process).

Two other claims are procedurally barred. The first of these is whether during a break in the defense counsel's cross-examination of a witness the state improperly showed to and discussed with the witness records which the defense was using to impeach the witness. The basis for Kelley's claim is contained in the trial record. Therefore, this claim should have been raised on appeal. Kelley also contends that his rights were violated by an improper closing argument. This is also a claim which should have been raised on appeal.

Kelley further claims that the court should have declared him indigent so as to provide him funding to obtain the services of certain experts. It should be noted that Kelley was being defended by private counsel rather than the capital collateral representative. Both of Kelley's lawyers admitted to being paid, though they declined to say who was paying them. Kelley mainly wanted experts to try to explain how he was

hampered by his inability to have available the evidence which had been destroyed. However, he was procedurally barred from presenting the destruction of evidence point. With respect to his desire to hire a state attorney to testify as to what a reasonably trained prosecutor would have known to turn over to the defense pursuant to a request under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the judge properly observed that he was in a position to determine what constituted exonerating evidence which should be disclosed pursuant to Brady, without the need of expert testimony. The judge did not abuse his discretion in denying the request for funds to hire the experts. See Quince v. State, 477 So.2d 535 (Fla. 1985), cert. denied, 475 U.S. 1132, 106 S. Ct. 1662, 90 L. Ed. 2d 204 (1986).

With respect to the two issues upon which testimony was taken, the judge's order succinctly addressed each of Kelley's contentions:

"ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SET ASIDE SENTENCE OF DEATH

"INTRODUCTION

"THIS MATTER came before the court on the defendant's Motion to Vacate Judgement of Conviction and Set Aside Sentence of Death filed pursuant to FRCrP 3.850. The Motion contains six grounds for relief. However, the court earlier determined that four of the six grounds were inappropriate for post conviction relief because the issues were, or should have been, raised on direct appeal. The two remaining claims, the prosecution's suppression of evidence favorable to the defendant (Brady violation), and ineffective assistance of counsel, were addressed at an evidentiary hearing in Highlands County, Florida, on July 18 and 19, 1988. After considering the evidence and testimony presented, and argument of counsel, the court finds that the defendant is not entitled to relief.

"I. BRADY VIOLATION CLAIM

"The defendant's first claim is based on alleged Brady violations. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), holds that the prosecution bears the duty of disclosing to the defense any material exculpatory information in its possession. The United States Supreme Court refined the materiality standard in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), holding that

'(t)he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense." 427 U.S. at 109.

The Court explained that the proper test was whether the suppressed information creates a reasonable doubt of guilt that did not otherwise exist. The Agurs materiality test was further expanded in a 1985 case, where the court stated:

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

Applying the above standards, this court's findings are briefly summarized as to each item of evidence or information allegedly withheld by the prosecution:

"1. The transcript of the first murder trial of John Sweet, the State's chief witness.

"Even if the State had deliberately withheld the transcript, which is not this Court's finding, this evidence was legally immaterial. The testimony regarding Irene Maxcy's sexual misconduct would have been inadmissible for the purpose of impeaching John Sweet. Furthermore, defense counsel was aware of the allegations concerning Mrs. Maxcy. The testimony regarding the taped phone conversations was also immaterial. The defense possessed a copy of the transcript of Sweet's second trial which contained essentially the same information as the first trial, and Sweet's alleged statement to Irene Maxcy that he did not know a 'William Kelley' is rendered irrelevant by Sweet's later testimony that he lied to the police about knowing the defendant.

"2. Latent Fingerprint Report

"The defendant never had actual physical possession of this report. However, the defense was aware, from the beginning of the trial, that none of the fingerprints matched the defendant's, and commented upon this fact during the closing argument. Moreover, John Sweet testified that the killer was wearing gloves at the time of the murder.

"3. A 1967 police report showing that a State's witness, Kaye Carter could not positively identify the defendant when shown a picture of him.

"From the testimony presented at the hearing, it appears likely that the defendant possessed a summary of the police report which, unlike the original full report, did not contain the line about Ms. Carter's identification of the defendant's photograph. The court finds no evidence, however, that the State intentionally or knowingly withheld the original report. Also, this evidence, even if helpful to the defense, was not material. Ms. Carter did pick out the defendant's photograph in 1967 during an investigative interview with police. Moreover, she positively identified a photo of the defendant at Sweet's second trial. Ms. Carter was not asked to make a courtroom identification of the defendant during his trial.

"4. Crime scene photographs.

"No photographs were deliberately withheld from the defense. The four photos which the defendant alleges would have helped in his defense were not introduced in evidence at trial, but were available for the defendant's inspection upon request. At least one photograph shows what appears to be bloody footprints or smudge marks at the crime scene. This evidence is immaterial, because the three color photographs which were introduced depicted 'a great deal of blood', as pointed out by Mr. Kunstler during cross examination. Even more important, the defense argument was contradicted by the testimony of J. C. Murdock, who stated that no bloody footprints were found.

"5. The fact that John Sweet received immunity in Massachusetts for his cooperation in the Maxcy case, among other things.

"The fact that John Sweet received immunity in both Florida and Massachusetts was well known by defense counsel. Sweet was extensively cross-examined by Mr. Edmund concerning the crimes for which he received immunity in Massachusetts. The court finds no evidence to support the inference that Sweet's Massachusetts immunity was contingent upon his testimony in the defendant's Florida trial.

"6. The prosecution, by agreement with John Sweet, precluded Roma Trulock from testifying at the defendant's trial.

"The court finds that there was no deal or agreement by the State not to call Roma Trulock, the primary investigating officer of the Maxcy murder. The defense could have called Mr. Trulock as a witness and, in fact, his name was included on the list of witnesses for the defense.

"To summarize the court's findings regarding the defendant's first claim, it agrees with the State that there were

no Brady violations. The fingerprint report, the transcript of John Sweet's first trial, and the original 1967 police report were the only items of evidence which the defense did not possess or have access to. The results of the fingerprint report were known to the defense and utilized at trial. The alleged items of exculpatory testimony presented at Sweet's first trial were either known to defense counsel, admitted by Sweet at the defendant's trial, or irrelevant as not involving Sweet, and Kaye Carter's questionable identification of the defendant in 1967 was immaterial.

"II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

"In his next ground for relief, the defendant claims he was denied effective assistance of counsel. All such claims must be examined in light of the standard enunciated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), where the court held that a determination must be made

'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.' 466 U.S. at 686.

"The defendant has the burden of satisfying both parts of a two-prong test:

'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death

sentence resulted from a breakdown in the adversary process that renders the result unreliable.' 466 U.S. at 686.

"This court, in reaching its findings, was mindful of the warning in Strickland to make every effort to eliminate the 'distorting effects of hindsight' and to judge the conduct of both counsel from their perspectives at the time of the trial. In addition, the acts or omissions of counsel found to be based on reasonable professional judgment or trial strategy were not considered in support of this ineffectiveness claim. See Strickland, supra; Downs v. State, 453 So.2d 1102 (Fla. 1984); Songer v. State, 419 So.2d 1044 (Fla. 1982). The allegations and findings under this claim are also briefly stated:

"1. Counsel failed to thoroughly investigate the nature and quantity of the evidence destroyed and, therefore, failed to present a full and accurate representation to the court.

"This issue was presented to the court in a pretrial motion to dismiss and was substantially raised on appeal. Although there are some differences between the evidence listed in the instant Motion and that argued before the court in the Motion to Dismiss, those differences are immaterial. Claims previously raised on direct appeal cannot be raised under the guise of ineffective assistance of counsel in a collateral proceeding. See Sireci v. State, 469 So.2d 119 (Fla. 1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3308, 92 L. Ed. 2d 721 (1986).

"2. Counsel failed to object to the testimony of the State's experts who presented scientific analysis of the destroyed evidence.

"No testimony was offered at the hearing in support of this claim. In any event, counsel were not ineffective for failing to object. J. C. Murdock and Heinrich Schmidt gave admissible testimony, and counsel stipulated to the testimony of James Halligan as a matter of trial strategy.

"3. Counsel failed to develop defense theories adequately. Specifically:

"Counsel failed to adduce evidence that the handwriting on the motel registration record was not the defendant's.

"The State never contended that the defendant himself signed 'Mr. and Mrs. William Kelley' on the register. His companion may have signed.

"Counsel stipulated to the State's evidence linking the Mr. and Mrs. William Kelley registered at the Daytona Inn to the motor vehicle owned by Jennie Adams.

"The stipulation involved reasonable trial strategy. The State could, and did, present live testimony by Lt. John Kulik to establish this link.

"Counsel failed to point out the distinctions between the man at the Daytona Inn, as described by Kaye Carter, and the defendant.

"These discrepancies did emerge at trial. Ms. Carter related the description she gave to investigators in 1967, and later John Sweet described how the defendant looked at that time. Defense counsel had good reason not to attack the lack of a courtroom identification by Ms. Carter, because that would have allowed the State to bring out her previous identification at John Sweet's second trial.

"Counsel failed to investigate and utilize the inconsistencies in the time

periods on the evening of the murder.

"There was no testimony offered on this issue. However, Mr. Edmund did comment on the time factor in his closing argument.

"Counsel failed to interview and call witnesses to testify regarding the defendant's physical characteristics in 1966.

"A review of the affidavits submitted by the defense shows how difficult height and weight estimates can be, even for those persons who allegedly knew the defendant at that time. The estimates are too varied to be of help.

"Counsel failed to obtain and present evidence (newspaper articles) which would explain the defendant's knowledge of the Maxcy killing when he was arrested.

"A review of the newspaper articles shows that they were extremely prejudicial to the defendant and could have been redacted only with difficulty. The articles are of dubious admissibility since no testimony was presented that defendant read or was told of the articles. There were obvious tactical reasons for avoiding their use, since they would have engendered negative jury speculation. Moreover, the subject was touched upon during cross examination by the defense.

"Counsel failed to obtain affidavits and present testimony from three attorneys that the defendant contacted them to determine if there was a warrant for the defendant's arrest.

"A review of the file shows that Mr. Barry Haight, one of the attorneys, was listed as a potential defense witness. The court notes, furthermore, that this type of evidence produces a double-edged sword, and could have been quite damaging to the defense. Defense counsel could have reasonably believed that a jury would find the defendant's conduct in this regard inconsistent with that of a law-abiding citizen.

"4. Counsel presented evidence to the jury of the defendant's prior crimes, bad acts, and other prejudicial information.

"This was deliberate trial strategy on the part of defense counsel in an attempt to show that John Sweet had a motive to lie about the defendant and get back at him. The court notes that counsel did an excellent job of maligning John Sweet's character in the defendant's second trial. Even though the court was convinced that Sweet was telling the truth by the

end of the trial, there were serious doubts that the jury would be so convinced.

"5. Counsel failed to object to a potentially coercive jury deadlock instruction.

"No testimony was presented on this issue. However, the argument was presented and rejected on direct appeal. See Sireci, supra.

"6. Counsel failed to adequately impeach John Sweet's credibility.

"The defense contends that, among other things, trial counsel failed to obtain a Massachusetts State Police Memorandum of 1977 concerning an investigation of Sweet's alleged criminal activities, and failed to object when the judge did not accommodate the jury's question about Sweet's immunity. The jury question issue was decided adversely to the defendant on appeal. See Sireci, supra. Furthermore, the court finds that counsel adequately impeached John Sweet. A review of the trial transcript shows that Sweet was rigorously cross-examined by defense counsel, who was able to uncover numerous incidents where Sweet received immunity for serious crimes and committed perjury. The additional areas of contradictory testimony referred to in the defendant's memorandum in support of this Motion would not have affected the outcome of the trial.

"7. Counsel failed to move for a change of venue.

"Both defense attorneys testified that the venue matter was discussed and rejected for strategic reasons. In addition, a review of the voir dire shows that there wad no problem in seating a jury in Highlands County. This may have been due to the fact that Highlands County has experienced an explosive population growth, mostly due to a recent influx of retirees. Consequently, a large number of jurors did not live in the county at the time of the murder in 1966. Mr. Edmund also testified that the decision to waive alternates was a matter

of trial tactics. No jurors became incapacitated. The court also notes that the defense used much less than the number of peremptory challenges allowed.

"THE TESTIMONY OF THE ATTORNEYS

"The unsigned affidavit of Mr. Edmund (attached to the instant Motion as Exhibit R-1) was not admitted in evidence at the hearing. The proposed affidavit resulted from an interview between investigator Marc Nezer and Mr. Edmund which lasted only about thirty minutes and was followed by a few telephone conversations of short duration. The affidavit itself was later prepared by two attorneys who had never met with Mr. Edmund, and was quite detailed considering the short length of the interview. It is more than likely, therefore, that the two attorneys who prepared the affidavit characterized Mr. Edmund's trial conduct inaccurately. In any event, Mr. Edmund chose not to sign this document, and instead prepared and signed an affidavit which he felt more closely portrayed his trial conduct. The defendant's claim that this affidavit represents what Mr. Edmund told Mr. Nezer at the interview is rejected insofar as it differs from the affidavit signed by Mr. Edmund.

"Both trial counsel testified at the hearing that they made mistakes during the trial, and would have approached certain matters differently given another chance. As the State correctly pointed out, an attorney's own admission that he or she was ineffective is of little persuasion in these proceedings. See Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Francis v. State, 529 So. 2d 670 (Fla. 1988) [13 FLW 369]. The court is also cognizant of the need to avoid the distorting effects of hindsight, and defer to the strong presumption in favor of effectiveness.

"But most important, this court, as trial court, observed the actions and conduct of both defense attorneys in the course of the two trials, and found their representation of the defendant to be capable and effective. The court does

recognize that Mr. Edmund and Mr. Kunstler disagreed at the hearing in regard to which attorney acted as lead counsel at trial and other matters. Mr. Kunstler has strong feelings against the death penalty. Apparently those feelings have affected his perception of the attorneys' actions at the trial. However, he conveniently finds the greatest fault to be with co-counsel, not himself. He remained silent at trial and for four years thereafter. A large part of his testimony is not credible. Based on demeanor, and the court's own observations in the courtroom, the court accepts Mr. Edmund's version insofar as any conflict exists.

"After careful consideration, the court now finds that none of the acts or omissions complained of in the defendant's motion rises to the level of ineffective assistance of counsel.

"While on the witness stand, Mr. Edmund expressed his belief in the unfairness of imposing the death penalty in a case such as this, where much of the physical evidence was destroyed prior to trial. The issue of the destroyed evidence was raised on appeal and rejected by the Florida Supreme Court in Kelley v. State, 486 So.2d 578 (Fla. 1986). This court is aware of the argument that 'death is different', and therefore errors of a fundamental constitutional nature should be cognizable in a 3.850 proceeding, even though they were, or should have been, raised on appeal. However, the law in Florida clearly mandates that the same rules apply in capital cases as in non capital cases, at least in regard to the procedural bar. Spenkelink v. State, 350 So.2d 85 (Fla. 1977) (England, J., concurring).

"In summary, the court finds that there were no Brady violations committed by the State, nor was there the slightest hint of prosecutorial misconduct. In addition, both defense counsel effectively represented the defendant.

"As a final comment, the court, who conducted the trial also, notes that at the close of the hearing, it was left with a strong conviction that the defendant is guilty of the crime

charged, that he received a fair trial, and that justice was done in this case. It is therefore

"ORDERED AND ADJUDGED that defendant's Motion to Vacate Judgment of Conviction and Set Aside Sentence of Death is denied.

"DONE AND ORDERED at Bartow, Florida, this 11th day of August, 1988.

"There was competent substantial evidence to support the conclusion that there was no Brady violation and that defense counsel was not ineffective. Further, even if the defense had. in its possession the items it claimed it should have had, it is clear that the result of the trial would not have probably been different.

While the order denying the motion for postconviction relief was on appeal, Kelley filed a motion to interview the jurors who sat on his original trial. He asserted that two attorneys had recently reported that one of the jurors told them of certain misconduct by another juror during the course of the trial. This Court relinquished jurisdiction to permit the judge to interview the jurors. The judge conducted a hearing in which all twelve jurors were interviewed together with the two attorneys who had reported the incident. The accusing juror backed off some of the accusatory statements attributed to him by the attorneys but continued to maintain that another juror told him that she had read a newspaper during the trial which reported that Kelley had a large sum of money in his possession when he was arrested. The accused juror emphatically denied having watched, read, or listened to any media account of the case or the defendant. She said she knew of no one on the jury bringing in any kind of outside information either by newspaper or any other source. She also denied the conversation testified to by the accusing juror. None of the remaining jurors were aware of any outside information having come to the attention of the jury.

In light of the conflicting evidence, the judge's finding of no juror misconduct must be sustained. We also agree that the judge properly refused to inquire into the assertions that the accused juror also may have been playing tic-tac-toe and may have changed her vote in order to meet a social engagement on the ground that such matters inhered in the verdict.

Finally, we reject Kelley's contention that the judge erred in denying the motion to recuse which was filed shortly before the jury interview. The asserted grounds did not set forth a legal basis for recusal.

We affirm the order denying Kelley's motion for postconviction relief.

It is so ordered.

Barkett and Kogan, JJ., concur in result only.

APPENDIX H

KELLEY
v.
FLORIDA.

No. 86-106

SUPREME COURT OF THE UNITED STATES

October 6, 1986

SUBSEQUENT HISTORY: Post-conviction proceeding at Kelley v. State, 569 So. 2d 754, 1990 Fla. LEXIS 1125 (Fla., 1990)

PRIOR HISTORY:

Sup. Ct. Fla.

Reported below: No. 86-106, 486 So. 2d 578. Kelley v. State, 486 So. 2d 578, 1986 Fla. LEXIS 1934 (Fla., 1986)

OPINION:

Certiorari denied.

DISSENTBY:

BRENNAN; MARSHALL

DISSENT:

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

APPENDIX I

WILLIAM HAROLD KELLEY, Appellant,
v.
STATE OF FLORIDA, Appellee

No. 65,134

Supreme Court of Florida

April 10, 1986

SUBSEQUENT HISTORY: Writ of certiorari denied Kelley v. Florida, 479 U.S. 871, 93 L. Ed. 2d 169, 107 S. Ct. 244, 1986 U.S. LEXIS 4148, 55 U.S.L.W. 3236 (1986)

PRIOR HISTORY:

An Appeal from the Circuit Court in and for Highlands County, E. Randolph Bentley, Judge - Case No. CR81-535. Sweet v. State, 235 So. 2d 40, 1970 Fla. App. LEXIS 6358 (Fla. Dist. Ct. App. 2d Dist., 1970)

COUNSEL:

Barry Haight, Milton, Massachusetts; and Donald L. Ferguson, Coconut Grove, Florida, for Appellant.

Jim Smith, Attorney General; and Karla J. Staker and Robert J. Krauss, Assistant Attorneys General, Tampa, Florida, for Appellee.

JUDGES:

Adkins, J. Boyd, C.J., and Ehrlich and Shaw, JJ., concur. Overton, J. concurs specially with an opinion.

OPINIONBY:

ADKINS

OPINION:

William Kelley appeals his conviction for the first-degree murder of Charles V. Maxcy and the death sentence imposed. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.

John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.

Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. *Sweet v. State*, 235 So.2d 40 (Fla. 2d DCA), *cert. denied*, 239 So.2d 267 (Fla. 1970).

At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten

years. This standstill was broken only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

It was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

Appellant's first trial ended in a mistrial, the jury unable to agree on a verdict. His second trial began in March of 1984. In the verdict presently appealed, the jury found Kelley guilty of first-degree murder and recommended the death penalty. In April 1984, the trial judge filed his written findings of fact in support of the death penalty. He found three statutory aggravating circumstances: prior conviction of a violent felony, section 921.141(5)(b), Florida Statutes (1983); homicide committed for pecuniary gain, section 921.141(5)(f); and homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). As a nonstatutory mitigating circumstance he found that appellant was the only participant in the murder to receive punishment.

Appellant raises a number of attacks on the trial of his case and the sentence imposed, alleging a number of prejudicial errors spanning from the time period well before his indictment to the case's conclusion. These contentions will be explored in the order presented.

Appellant first argues that the state's destruction of the real evidence in the case over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense. In addressing this contention, the unusual procedural history resulting in this problem must be considered.

After the reversal of Sweet's second conviction on appeal, he successfully moved for the dismissal of his indictment. At that point, with no active suspects capable of prosecution, the case file, including the evidence involved, was transmitted to the clerk of the court for maintenance. The evidence there remained until April of 1976, nine and a half years after the murder. At that point the state, at the clerk's request, moved for an order requesting the court's permission to dispose of the evidence. The state's motion, indicating that "this cause has been disposed of," was granted and the evidence destroyed. The case subsequently lay dormant until Sweet's testimony against appellant Kelley revitalized the prosecution in 1981.

The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment. Copies of the documentary evidence in the case, by far the bulk of the evidence presented at the earlier Sweet trials, were preserved and used against appellant in the trial below.

Appellant argues that the state's intentional destruction of the evidence of Maxcy's killing over five years before his

indictment for a murder committed in 1966 so violated his due process rights that his indictment should have been dismissed. While recognizing that serious constitutional rights are involved in this question, and that the trial of a capital case in the absence of physical evidence raises grave concerns as to fairness, we cannot agree that in this case appellant's due process rights have been violated.

In resolving the serious problems involved when evidence once in the possession of the state is either lost or suppressed, Florida's courts have built their analyses upon the United States Supreme Court's decisions of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). *Brady* laid down the proposition that "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

The *Agurs* Court refined the *Brady* holding by exploring the concept of constitutional "materiality." The bottom line concern in a suppressed evidence case, the Court made clear, is the justice of the finding of guilt. If, upon consideration of the record as a whole, the omitted evidence creates a reasonable doubt not otherwise existing, the evidence is material and constitutional error has been committed. Due process rights are not violated in every case involving the suppression of evidence. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-10.

In *State v. Sobel*, 363 So.2d 324 (Fla. 1978), this Court utilized that language from *Agurs* in formulating an analysis applicable to the issue of appropriate sanctions when the state has destroyed evidence. Recognizing that "dismissal of charges against a defendant . . . was an extreme sanction to be

utilized with the greatest caution and deliberation," *Sobel*, 363 So.2d at 327, this Court approved an analysis balancing any negligent or culpable conduct of the prosecutor with any prejudice resulting to the defendant from the destruction of the evidence. Fairness dictated that the burden be placed on the state to prove lack of prejudice to the defendant, if it so contended.

In *Salvatore v. State*, 366 So.2d 745 (Fla. 1978), *cert. denied*, 444 U.S. 885, 62 L. Ed. 2d 115, 100 S. Ct. 177 (1979), we reiterated this balancing standard, implicitly recognizing that each of the factors considered reflected different aspects of the same fundamental concern -- that the defendant received a fair trial. The standard of prejudice which must be met by the defendant, we held, varies inversely with the degree to which the conduct of the trial below has violated fundamental notions of fairness. In *Salvatore*, finding no negligence on the part of the prosecution, we noted that "it should not be presumed that error injuriously affects the substantial rights of the defendant," 366 So.2d at 751, and found that Salvatore's rights had not been violated by the loss of evidence in the case.

Appellant argues that application of the variable standard analysis established in *Sobel* and *Salvatore* to the facts of this case mandates a different result. Because the state-ordered destruction of the evidence was at best inexcusable negligence, it is argued, the conduct of the state weighs heavily towards reversal of the decision below. Citing the lack of a statute of limitations for first-degree murder, and appellant's status as a suspect since the commission of the murder in 1966, appellant urges that the state's destruction of the evidence constituted a breach of its extraordinary duty under these facts.

While we find the destruction of the evidence in this case unfortunate, we cannot read the facts as even hinting at intentional behavior by the state affecting appellant's substantial rights. While extremely hesitant to condone the

state's behavior here, we find no negligence in its actions. Obviously, the state had insufficient evidence to proceed against appellant until Sweet offered his testimony in 1981. The destruction of the evidence took place nearly nine and a half years after the state's fruitless efforts to convict Sweet, and five years before appellant's indictment.

In a sense, this is a case of first impression, in which the principles set forth in *Brady, Agurs, Sobel* and *Salvatore* are applicable only by analogy. In none of those cases was the lost or destroyed evidence completely unlinked to any active, or even foreseeable, prosecution. On the unusual facts of this case, therefore, the state's behavior may be excused. We wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different.

In applying the second prong of the analysis, we find that the state has met its burden of establishing lack of prejudice to the appellant's case. Phrased alternatively, we find that appellant has failed to establish a sufficient degree of prejudice to justify a reversal of his conviction. *Demps v. State*, 395 So.2d 501, 504 (Fla.), *cert. denied*, 454 U.S. 933, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

In resolution of this necessarily speculative analysis, appellate courts have tended to defer to the findings of the trial court on the matter. *Sobel*, 363 So.2d at 328; *Smith v. State*, 400 So.2d 956 (Fla. 1981); *Krantz v. State*, 405 So.2d 211, 212 (Fla. 3d DCA 1981); *Budman v. State*, 362 So.2d 1022 (Fla. 3d DCA 1978). The trial court below specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or create an otherwise non-existent reasonable doubt. In light of the centrality of testimony rather than real evidence in the case, we cannot disagree. We therefore find the denial of appellant's motion to dismiss the indictment proper.

In his second point on appeal, appellant argues that the trial court erred in permitting a witness to testify as to an alleged conversation he had with John Sweet in 1967. The witness, Abe Namia, was a private investigator hired by Sweet's trial counsel after the murder in 1966. During the conversation, Sweet allegedly made some statements which now incriminate appellant. Namia's testimony was admitted below as testimony of prior consistent statements by Sweet, rebutting an inference of recent fabrication or improper motive established in Sweet's cross-examination.

We reject appellant's contention that Namia's testimony was hearsay and improperly admitted. Defense counsel clearly established an inference of improper motive to fabricate through its extensive cross-examination of Sweet concerning the laundry list of crimes for which he had been given immunity in return for his testimony against Kelley. Appellant does not deny that the jury was left with an impression of Sweet's improper motive to fabricate, *Van Gallon v. State*, 50 So.2d 882 (Fla. 1951), but argues that Sweet's statements as reported by Namia were not sufficiently consistent with Sweet's testimony at trial to be properly admissible under section 90.801(2)(b), Florida Statutes (1983).

While keeping in mind that "a failure to properly adhere to the requirement of consistency tends to border on a disregard of the dangers sought to be restrained by the hearsay rule," *Sosa v. State*, 215 So.2d 736 (Fla. 1968), we find that the two statements concerning the murder varied in only legally insignificant aspects. More troublesome than these minor inconsistencies was the fact that Namia's recollection of Sweet's prior testimony contained certain facts beyond those in Sweet's testimony in chief, which Namia's testimony was admitted to corroborate.

Sweet, according to Namia, had informed Namia that prior to the murder certain unidentified assassins had twice travelled to Florida to kill Maxcy. Although Sweet's

testimony in chief did not refer to these shadowy figures, we find that no reversible error was committed in that the additional facts involved were neither highly incriminating nor critical to the establishment of an ultimate fact in dispute. *Sosa*, 215 So.2d at 745.

In short, appellant was not prejudiced by the admission of the testimony. We have before held, too, that questions concerning the admissibility of extrajudicial statements for the purpose of rehabilitating witnesses impeached by the inference of a recent motive to fabricate are largely addressed to the sound discretion of the trial court, and are not to be reversed in the absence of a prejudicial abuse of discretion. *Sosa*, 215 So.2d at 744. *See also United States v. DeVore*, 423 F.2d 1069, 1073 (4th Cir. 1970), *cert. denied*, 402 U.S. 950, 29 L. Ed. 2d 119, 91 S. Ct. 1604 (1971). We find no such abuse of discretion below, and so reject appellant's argument.

Next, appellant argues that the trial court erred in failing to answer a question addressed to it by the jury during its deliberations. After several hours of deliberation, the jury announced that it had reached an impasse. Upon receiving an *Allen* charge, *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896), the jury resumed its deliberations. The interaction in question occurred when the jury subsequently inquired of the court whether "John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony."

The trial court, while aware that Sweet's testimony on cross-examination established the existence of such immunity, declined to explicitly answer the jury's question concerning the crucial issue since formulating an answer would have required him to both interpret Sweet's testimony and make a judgment as to his motivation.

Rather, the trial court offered to the jury to have Sweet's testimony read back in portions designated by the jury. We

can see no abuse of discretion in such action. The court's insistence upon the jury's rather than its own choice of the passages to be re-read was proper, in light of the latter's legitimate hesitation to comment upon the evidence. The jury question here involved matters of fact, and this Court has held that a trial judge need answer only questions of law raised by jurors. *State v. Ratliff*, 329 So.2d 285 (Fla. 1976).

In rejecting appellant's contention that the court below acted improperly in this respect, we finally note that Florida law has given the trial court a wide latitude in deciding whether or not to have testimony re-read to jurors upon request. Fla. R. Cr. P. 3.410; *DeCastro v. State*, 360 So.2d 474 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1365 (Fla. 1979); *Simmons v. State*, 334 So.2d 265 (Fla. 3d DCA 1976).

In his fourth point on appeal, appellant contends that the trial court erred in allowing the jurors to take notes during the trial and failing to adequately instruct the jury as to the proper role of note-taking. Whether or not a jury is to be allowed to take notes and use them in the deliberation process is a question within the sound discretion of the trial court. *United States v. Rhodes*, 631 F.2d 43 (5th Cir. 1980); *United States v. Riebold*, 557 F.2d 697 (10th Cir.), *cert. denied*, 434 U.S. 860, 98 S. Ct. 186, 54 L. Ed. 2d 133 (1977).

The jurors were informed by the court that note-taking was optional, and instructed that a juror's note-taking in no way gave him or her authority over the others on the panel. We reject appellant's assertion that the jury was inadequately instructed, noting that no additional or different instructions on the matter were proposed by the defense below.

Next, appellant argues that the trial court erred in admitting certain of his post-arrest statements to FBI agents obtained in violation of his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Appellant, allegedly in a slightly inebriated condition, was given and examined a *Miranda* warning form for 15-20

seconds before he returned it, saying "I know my rights." Later in the book-in procedure, appellant learned that he was wanted in Highlands County, Florida, for murder. After an agent commented to appellant "I'm certainly sure that Highlands County is going to place a detainer on you once they know you have been arrested in Florida," appellant made some statements about Maxcy's murder.

We need not reach in this case the validity of the *Miranda* warnings as given, and the possible effect of appellant's intoxication, in light of our finding that the agent's statement was not an interrogation within Miranda's purview. The statement, in other words, was not a deliberate attempt to elicit an incriminating response, as prohibited by *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The incriminating statements here in question were therefore volunteered, and neither the letter nor spirit of *Miranda* has been violated. The statements were therefore properly admitted into evidence.

Appellant next mounts an attack on certain instructions given to the jury in an effort to break a deadlock after it had deliberated for several hours and announced that it had reached an impasse. The judge gave Florida Standard Jury Instruction 3.06, the authorized jury deadlock instruction, and then proceeded to add some comments of his own. These comments, appellant argues, impermissibly misled and so coerced the jury into returning a verdict that appellant was deprived of his right to a fair trial.

As we have before recognized, the standard jury instructions should be utilized whenever appropriate, *State v. Bryan*, 290 So.2d 482 (Fla. 1974); *Rigot v. Bucci*, 245 So.2d 51 (Fla. 1971), for a trial judge walks a fine line indeed upon deciding to depart. Instructions given to a jury at the extremely sensitive point it has reached a deadlock must be carefully scrutinized, *Kozakoff v. State*, 323 So.2d 28 (Fla. 4th DCA 1975), *cert. denied*, 336 So.2d 1184 (Fla. 1976), and the risk is too great that an imprudent instruction may lay to

waste the conscientious conduct of an otherwise entirely fair trial.

While the standard instructions are therefore to be preferred, the trial court's failure to give them does not determine the issue. A court's straying from the standard instructions, we have held, does not require automatic reversal. *State v. Bryan*, 290 So.2d 482 (Fla. 1974). The analysis is not so simple. We must here join the courts which have scrutinized extemporaneous deadlock instructions with an eye towards ensuring that no false duty to decide was suggested, *Nelson v. State*, 438 So.2d 1060 (Fla. 4th DCA 1983); *Lincoln v. State*, 364 So.2d 117 (Fla. 1st DCA 1978), that the verdict returned was not coerced, *Jenkins v. United States*, 380 U.S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957 (1965), and that the instructions were "balanced," encouraging neither acquittal nor conviction. *State v. Bryan*, 290 So.2d 482 (Fla. 1974); *Gardner v. State*, 405 So.2d 470 (Fla. 3d DCA 1981).

At this point it may be helpful to consider the actual instructions which appellant here attacks:

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustively than it has been.
>
> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.

> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further.

Appellant contends that these instructions so strayed from permissible bounds that the jury was coerced into returning its verdict of guilt, and that the verdict must therefore fall. While reluctant to engage in the speculative analysis of the effect these instructions may have had on the uncertain jury deciding appellant's guilt, we must, and find that caselaw and logic support the appealed conviction.

A fine line must be drawn in such an analysis, but we find that substantially similar instructions have been upheld, *United States v. Dixon*, 593 F.2d 626 (5th Cir.), *cert. denied*, 444 U.S. 861, 62 L. Ed. 2d 82, 100 S. Ct. 126 (1979), and that instructions found prejudicial differ in some crucial respects from the instructions given below. Appellant contends, for example, that the result in *Nelson v. State*, 438 So.2d 1060 (Fla. 4th DCA 1983), should obtain in the instant case. For purposes of comparison, it will be useful to examine the instructions given in that case:

> I don't think that anybody here would be served by you all not arriving at a verdict. It would be wasting your time for whatever period of time which I guess is . . . seven days now. Nobody can repeat this testimony and exhibits placed before you. If you all cannot arrive at a verdict, then something is wrong. . . . You just don't understand what happens if we had to retry this case. It is not just reproducing the witnesses . . . but it is going through this whole reppertoire [sic] again for you or for someone else when it is

> really not necessary. You have heard all the law. That is all the evidence there is. That is it as far as what was presented here before you. We look to you for the resolution of this case. It's that pure and simple. . . .
>
> I can't see that it would be impossible when we have just such a fine jury here.

438 So.2d at 1061.

The Fourth District found these instructions coercive in effect. A close examination of the instructions makes clear the prejudicial components which rendered the statement as a whole sufficiently coercive to justify the reversal of a first-degree murder conviction.

First, the instructions subverted the proper role of a jury in a capital trial by implying a false duty to reach a verdict in the case. *Lincoln v. State*, 364 So.2d 117 (Fla. 1st DCA 1978). Second, the jury was left with the impression that failure to return a verdict would constitute waste, and would put the court to a great deal of trouble upon retrial. *United States v. Betancourt*, 427 F.2d 851 (5th Cir. 1970).

Because the instructions in *Nelson* "made it appear that unless a verdict was reached . . . the court's confidence in the jury's common sense would somehow have been betrayed," 438 So.2d at 1063, the Fourth District found the risk unacceptably high that even a single juror may have been influenced to abandon his conscientious belief as to the correctness of his position.

The instructions given in the instant case presented no similar threat to the integrity of the jury system. Rather than demanding a verdict, the judge below demonstrated an attitude represented by his statement, "I would ask that you retire at this time and consider whether you wish to consider the matter further." We also note that the jury continued to

deliberate for a considerable period of time after receiving the instruction, returning to ask the court for an unrelated instruction. In sum, while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given.

In his seventh point on appeal, appellant argues that he was denied his sixth amendment right to the effective assistance of counsel. Generally, such claims are not reviewable on direct appeal but are more properly raised in a motion for post-conviction relief. *Perri v. State*, 441 So.2d 606 (Fla. 1983); *State v. Barber*, 301 So.2d 7 (Fla. 1974). Unlike those claims raised under the banner of ineffective assistance which we determined should have been raised on direct appeal in *Adams v. State*, 456 So.2d 888 (Fla. 1984), the claims here raised by appellant cannot be sufficiently determined by the record as it stands. The issue is therefore not properly raised here.

Finally, appellant raises a number of arguments attacking the application of the death penalty statute to his case and the statute's constitutionality. Having carefully reviewed each of these contentions, they are found to be without merit. Appellant's conviction and death sentence are therefore affirmed.

It is so ordered.

BOYD, C.J., and EHRLICH and SHAW, JJ., concur.

OVERTON, J., concurs specially with an opinion.

CONCURBY:

OVERTON

CONCUR:

OVERTON, J., concurring specially.

Because this involves the "triggerman" in a contract killing, the death penalty is appropriate. I am concerned, however, that our system of justice has allowed Sweet, who instigated, planned, and directed this murder, to receive total immunity from prosecution for this murder.

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 06 2004
THOMAS K. KAHN
CLERK

No. 03-10513-P

WILLIAM H. KELLEY,

Petitioner-Appellee,

versus

SECRETRY FOR THE DEPARTMENT OF CORRECTIONS, Secretary Florida Department of Corrections,

Respondent-Appellant.

On appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion July 23, 2004, 11th Cir., 2004,___F.3d___).

Before: TJOFLAT, ANDERSON and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

Entered for the court:

_____

/s/ GERALD B. TJOFLAT
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-14246-CIV-ROETTGER

WILLIAM H. KELLEY,

Petitioner,

v.

HARRY SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.
_____/

JOINT PRETRIAL STIPULATION OF FACTS

CLAIM I

A. Sweet's Immunity Deal with Massachusetts and Florida

1. In the State's Attorney's Office in Bartow, Florida, on March 6th, 1981, Mr. Kelley's trial prosecutor, Hardy Pickard, met with Massachusetts District Attorney Robert Kane, Massachusetts trooper Bruce Gordon, retired Florida prosecutor Glen Darty, retired Florida Department of Law Enforcement (FDLE) Special Agent Roma Trulock, Florida

State Attorney Quillian Yancey, FDLE Special Agent Joe Mitchell, and Paul Cataldo, a Massachusetts attorney representing Sweet. (PC 88, 228, 271-274, 280-83)[1]

2. As a result of this meeting, it was decided that a second meeting, with Mr. Sweet present, would be conducted in Massachusetts. (PC 289-90)

3. On March 12th, 1981, John Sweet was interviewed in Massachusetts about the Maxcy murder by Mr. Yancey, Mr. Pickard, and S.A. Mitchell. (PC 89, PC Def. Ex. #9)

4. At the March 12th meeting, Mr. Sweet's attorney requested that the interview not be taped and that Sweet not be required to speak under oath. (PC 162-63, PC 289-91)

5. On March 13th, 1981, Mr. Sweet received immunity for various offenses in Massachusetts. (PC 89)

6. The fact that John Sweet received immunity in both Florida and Massachusetts was known by defense counsel. Sweet was cross-examined by Mr. Edmund concerning the crimes for which he received immunity in Massachusetts. The state courts found that no evidence had been presented in state court to support the inference that Sweet's Massachusetts immunity was contingent upon his testimony in the

---

[1] References to the various trial records are denoted as follows: "R ___" denotes the original trial and direct appellate record; "PC___" denotes the state post conviction record; "Kelley I" and "II" denote the 1984 trial and retrial of Mr. Kelley, respectively; "Sweet I" and "II" denote the 1967 and 1968 trial and retrial of John Sweet; "PWHC" refers to Mr. Kelley's Petition for Writ of Habeas Corpus filed herein in October, 1992.

defendant's Florida trial.[2] (3.850 Order; *Kelley v. State,* 569 So. 2d 754, 758 (Fla. 1990)).

7. Sweet testified at trial that 3 or 4 years earlier, he had decided to come forward with knowledge about various crimes in Massachusetts as well as the Maxcy case. (R. 605) According to Sweet, as a result of his discussions with law enforcement, he received immunity in Massachusetts for a number of crimes, including hijacking and loan sharking. (R. 605-08) On cross-examination, Sweet acknowledged having received immunity in Florida for the Maxcy case and for the perjury committed in his first two trials, and in Massachusetts for breaking and entering, hijacking, larceny, arson, bribery, bookmaking, counterfeiting, and drug and prostitution offenses. (R. 614-19, 622-29)

8. Documents describing the meetings in Massachusetts and Florida on March 6th, 12th, and 13th, 1981, were first disclosed after the initiation of post conviction proceedings pursuant to Rule 3.850. Trial counsel saw a copy of Sweet's "Contract for Immunity" with the State of Florida for the first time during post conviction evidentiary hearings in state court. (PC 83-90, 107, 159-60, 355-57; PC Def. Exs. # 14, 22) Trial counsel saw a copy of the order granting Sweet immunity in Massachusetts for the first time during post conviction evidentiary hearings in the state court. (PC 83-90; PC Def. Exs. # 10)

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[2] Throughout this stipulation, references will be made to various state court findings of fact. Without regard to the "correctness" of such findings, the parties seek to assist this Court merely by identifying certain key findings and agreeing that they were made. In his habeas petition and Traverse to the state's response thereto, Mr. Kelley sets forth numerous arguments for non-deference to the state findings.

9. In a written report of the March 6th meeting, Special Agent Mitchell described Massachusetts attorney Paul Cataldo as representing Sweet for immunity in Massachusetts. The report was first made available to Mr. Kelley during state post conviction proceedings. (PC 281)

10. During jury deliberations at Mr. Kelley's first trial ("Kelley I"), the jury requested that Sweet's entire testimony be read again. Sweet's testimony was re-read to the jury, after which they announced they were unable to reach a verdict. The court declared a mistrial. (PWHC Appendix 9)

11. At retrial, in his closing argument, Mr. Pickard told the jury: "John Sweet did not have to give the police Kelley to get immunity . . . . It has nothing to do with the Maxcy case or giving them Kelley on the Florida cases. He already had his immunity from Massachusetts . . . . He didn't have to give them Kelley to get immunity." (R 863)

12. After seven hours of deliberation, the jury at retrial sent a message to the court that it could not reach a verdict, to which the court noted a "feeling of déjà vu." (R 922) The jury announced that they had voted three times and were at an "impasse." (R 923) After further deliberations, the jury submitted a question to the court concerning the sequence of events leading to Sweet's grant of immunity and inquiring whether "he had anything to gain by his testimony." (R 925)

13. After lengthy discussion with the attorneys, the trial judge told the jury:

> "The bottom line, I regret to advise you I cannot answer your question. I think that needs some explanation.

"First of all, the Court cannot comment on the evidence. That is the full burden of the Jury and it would be improper for the Court to do that. Any question that cannot be answered except on the evidence, it can be answered by the Court.

"I think in fairness I should advise you that you do have the right to request that certain portions of the testimony be read back either by designating a witness by name or if it is a witness on the stand for some time and you don't require it all, if you clearly identify the portions of the testimony you want you can have it read back.

"I should caution you should designate it in a way that the Court can find it.

"If the markers you give for what you want to hear is such that I couldn't make the selection then without feeling like I had commented on it.

"That is a fairly convoluted statement, but anything that would require the Court to comment on the evidence, I wouldn't be able to help you. But I can have testimony or you can request testimony to be read back if it's not too lengthy. Otherwise, I will advise you how long it would take to read back and you could decide whether you want to do it.

(R 935-936) After these instructions, the jurors were excused to deliberate further, and they made no requests for the reading of testimony.

14. The jury subsequently returned a verdict of guilty.

B. Transcript of Sweet I

15. Pretrial, Mr. Kelley requested the transcript from John Sweet's first trial. (PC 44)

16. In response to this request, Mr. Pickard sent a letter to defense counsel stating that he was "unaware of the status" of the transcript and directing defense counsel to contact the court reporter. (State's Response in Opposition to Petition for Writ of Habeas Corpus, p. 30; PWHC Appendix 3)

17. The court reporter's notes of this trial were destroyed in early 1983, after Mr. Kelley's indictment, but before his trial. (See Supplementary Appendix to Appeal of Denial of 3.850 Relief, p. 33)

18. The court reporter was unable to provide a copy of the transcript. (PC 44, testimony of William Kunstler)

19. The defense never received the transcript and never saw it until 3.850 hearings. (PC 49, 93-95)

20. The State now acknowledges that, in fact, it had the transcript in its files. (State's Response to 3.850 motion, p. 3; see also State's Response in Opposition to Petition for a Writ of Habeas Corpus, p. 30)

21. In Sweet I, Irene Maxcy testified that her telephone conversations with Sweet were bugged by Florida authorities. (Sweet I, p. 138-39) Additionally, in Sweet I, Sweet testified that during this period Ms. Maxcy had assured him that the calls were not bugged, and that he spoke on the telephone to Ms. Maxcy over one hundred and fifty times. (Sweet I, pp.

827-28, 846; PC 265; PC Def. Ex. #19) Further, in Sweet I, John Sweet testified that, in a telephone conversation with Ms. Maxcy, he stated that he did not know a "William Kelley." (Sweet I, pp. 827-28, 1129; PC 50)

22.. Sweet testified at trial that he lied to the police and others about knowing William Kelley. (3.850 Order; *Kelley v. State*, 569 So. 2d at 757; R. 600-01, 639).

23. At Sweet's second trial, the transcript of which was available to the defense, reference was made only to a single taped telephone call. (PC 134 36, Sweet II, p. 789) At the second trial, Sweet testified that he had known Irene Maxcy's telephone was bugged. (Sweet II, p. 1039)

24. In Sweet I, John Sweet testified that, during a conversation with Irene Maxcy at the Lake Wales Country Club in which she urged Sweet to make a deal with the state, Sweet denied knowing a William Kelley. (Sweet I, p. 1129)

25. Mr. Kelley requested access to any and all tapes of conversations between Sweet and Irene Maxcy, and was told that none existed. (PC 136)

C. Withheld Photographs

26. Four photographs of the crime scene were never given to the defense. (PC 34, 131-32) At the state post-conviction hearing, the judge found that the photos were not deliberately withheld and that they were "available for the defendant's inspection upon request." (3.850 Order; *Kelley v. State*, 569 So. 2d at 758)

27. One of those photographs showed massive amounts of

blood at the crime scene and was described by the state courts as depicting "what appears to be bloody footprints or smudge marks" in the blood. *(Kelley v. State,* 569 So. 2d at 758)

28. The post-conviction order stated that three color photographs were introduced at trial which showed a great deal of blood at the crime scene. *(Kelley v. State*, 569 So. 2d at 758)

29. At trial, Officer J.C. Murdock testified that no bloody footprints had been found at the crime scene. (R 496)

30. At Mr. Kelley's trial, John Sweet testified that the killers had fled the scene of the crime in Charles Von Maxcy's car. (R 593-94) No blood was found anywhere in Charles Von Maxcy's car. (R 496-97)

31. No blood was found in the sinks at the Maxcy house, or in any of the places that the killers might have washed blood off themselves. (R 496)

32. At trial, the defense argued that had Mr. Kelley committed the crime, he would have been covered in blood. (PC 131)

D. Withheld Fingerprint Report

33. A Florida Sheriff's Bureau latent fingerprint report was never given to the defense. This report compared prints from the scene to William Kelley's prints and concluded that there was no match. (PC 80-82; PC Def. Ex. # 8)

34. The defense was aware, from the beginning of the trial,

that none of the fingerprints matched the defendant's. *(Kelley v. State, 569* So. 2d at *758)* At trial, the defense told the jury that prints had been taken from the scene of the crime and that none had been identified as belonging to Mr. Kelley. (PC 128)

35. John Sweet testified at Kelley's second trial that the killer wore gloves at the time of the murder. *(Kelley v. State*, 569 So. 2d at 757; R 593)

E. Withheld Non-Identification by Kaye Carter

36. Kaye Carter was a clerk at the Daytona Inn Motel in 1966. According to testimony at both Sweet trials and both Kelley trials, the "hit men" recruited by Sweet stayed at the motel on October 2-3, 1966, the weekend of the murder. One of these individuals registered at the motel under the name of William Kelley. (R 680-83)

37. On Oct. 3, 1966, Kaye Carter had dinner with the man registered as William Kelley. (R 680-83)

38. At that time, Kaye Carter described the William Kelley from the motel as being about 40 years old, six feet tall, medium build, with dark curly hair and a husky voice. (PC 241)

39. In 1967, then-Special Agent Roma Trulock interviewed Kaye Carter. He showed her several photographs including one of Mr. Kelley, and asked whether she could identify the "William Kelley" who had registered at the motel. (PC 238-39) Ms. Carter remarked that the photograph of Mr. Kelley looked "something like" the man at the motel, but stated she was "sure" that the man was older than the 26 years old, as

was denoted on the photograph of "Mr. Kelley." (PC 242)

40. The defendant is 6 feet five inches tall and has straight hair. At the time of the murder in 1966, he was 23 years old.

41. Although the defense had access to a statement by Ms. Carter in which she had described the man from the motel as being about forty years old, six feet to six feet two inches tall, medium build with dark, kind of curly hair, and a deep husky voice, the report describing Ms. Carter's inability to identify Mr. Kelley from a photograph during the interview described above in Paragraph 36 was never given to the defense, and was only later obtained by Mr. Kelley in response to a public records request during state post conviction proceedings. (PC 78-80, 146; PC Def. Ex. # 7)

42. Ms. Carter had picked out Mr. Kelley's photograph during the interview described in the report, but had stated that the photo looked "something like" the man she had seen and that she was "sure" that the man she had seen was older than the man in the photograph. (PC Def. Ex. #7; PC 239)

43. The state courts found "no evidence . . . that the State intentionally or knowingly withheld" this report. *(Kelley v. State*, 569 So.2d at 758)

44. Ms. Carter positively identified a photograph of the defendant at Sweet's second trial in 1969 (3.850 Order; *Kelley v. State*, 569 So. 2d at 758), two years after the police interview in which she had been unable to make a positive identification.

45. At trial, Ms. Carter was not asked to positively identify defendant Kelley as the individual who had registered at the

motel in 1966 as "William Kelley." Prosecutor Pickard, in argument, attributed Ms. Carter's inability to make a positive identification to the passage of many years' time, without mentioning that she had been similarly unable to identify him in 1967. (R 866-67)

46. At trial, Prosecutor Pickard stated to the jury that: "I think it's very difficult to expect someone who doesn't know a person, who sees them only briefly over a two day period of time to come into court seventeen and a half years later . . . . It's extremely difficult to ask somebody to do that . . . . [She] didn't know [she was] going to be required seventeen years later to come in to court to identify him. . . . [M]aybe they would have made a greater effort to remember him. But they didn't know this was going to come up seventeen years later and they would need to identify him." (R 866-67)

F. Newspaper Articles

47. At trial, Agent Ross Davis testified that when William Kelley was arrested in 1983, Mr. Kelley said, "That must be a 17 or 18 year old case," and mentioned the names of some of the people involved in the case. (R 760-61)

48. At Mr. Kelley's trial, Mr. Pickard argued to the jury that Mr. Kelley's knowledge of the case could not have come from news accounts, and that he therefore must have been involved in the murder. Mr. Pickard argued: "Apparently Mr. Kunstler wants you to believe that Mr. Kelley was giving out this information based on things he read in the newspapers. But remember, this was 1966 and 1967, this was 1983 in Tampa, Florida. Anything that came out in the newspapers in Boston would have come out seventeen or eighteen years ago. I think it is highly unlikely that Mr. Kelley is going to, off the

top of his head, spout off recollections of something he read in the newspaper seventeen years ago." (R 877)

49. In the month of December, 1981, four different newspaper articles appeared in Massachusetts newspapers discussing the Maxcy murder, at least one of which mentioned William Kelley by name. Three of the articles came from newspapers from Mr. Kelley's hometown of Brockton, Massachusetts. (PC 65-69)

50. At the time of trial, defense counsel was unaware of these articles. (PC 65-70)

51. Two of these articles were written by a reporter named James Barrington. (PC 65-69) Prior to publishing the articles, Mr. Harrington spoke with Mr. Pickard on the telephone, informed him that he was a newspaper reporter, and asked him about the case. Information provided by Mr. Pickard was used to write the articles. (PC 181-86, testimony of James Harrington) Harrington received the information about Kelley's indictment from another source; Mr. Pickard told Harrington that the indictment was sealed. (PC 187)

52. The prosecutor's files, received by Mr. Kelley through a public records request prior to the 3.850 hearing, contained a telephone message from Mr. Harrington to Mr. Pickard. (PC 70-73)

53. At the post-conviction evidentiary hearing, attorney Barry Haight testified that Mr. Kelley either read or heard about his indictment for Maxcy's murder (PC 190-91) and asked Haight to look into whether an indictment had been returned against him. (Id.) Haight testified that he had read the local news reports, and that Kelley and Haight discussed, on more

than one occasion, the possibility that an indictment had been returned. (Id.)

54. The state courts held that "no testimony was presented that the defendant read or was told of the articles." (3.850 Order; *Kelley v. State*, 569 So. 2d at 760)

55. The state courts determined that Kelley's claim of prosecutorial misconduct based on statements made during closing argument regarding the defendant having read newspaper articles was procedurally barred. (3.850 Order; *Kelley v. State*, 569 So. 2d at 755)

CLAIM II

A. The failure to prepare for trial; delegation of responsibility to Harvey Brower

The facts contained in paragraphs 56-63 were elicited in the state court evidentiary hearing but were not specifically pled in the Rule 3.850 motion. The state contends that Claim II.A is barred and should not be considered by the Court.

56. Defense counsel delegated responsibility for virtually all pretrial matters, including all pretrial motions, investigations, and witness interviews to Harvey Brower. (PC 119)

57. Brower provided "no report" on any pre-trial investigation, provided Kelley's lawyers with phony witness lists containing non-existent addresses, and then "absconded" on the eve of Kelley's first trial. (PC 39, 95-97)

58. Despite Brower's disappearance, defense counsel Kunstler failed to move for a continuance.

59. Defense counsel Kunstler first met his capital client, Mr. Kelley, one week before Kelley's first trial. (PC 17)

60. Counsel for defense took no depositions. Mr. Kunstler did not know that depositions were allowed in criminal cases in Florida. (PC 163-64) Mr. Edmund testified that he avoided taking pretrial depositions as a matter of trial strategy. Mr. Edmund believed that taking depositions helped the State to prepare for its case, and depositions were not necessary when the information could be obtained through other avenues of discovery. (PC 402)

61. At Mr. Kelley's first trial, Mr. Kunstler was lead counsel. At retrial following the hung jury, Mr. Edmund assumed the role of lead counsel, and Mr. Kunstler served as second chair. Mr. Kunstler testified that between Kelley's trials, Mr. Edmund employed an investigator who looked into the matter of Abe Namia's missing reports. (PC 98-100, 120) Mr. Edmund testified that he did not recall hiring an investigator between the two trials. (PC 342)

62. Defense counsel did not depose John Sweet and did not question him prior to Mr. Kelley's first trial about the substance of his immunity negotiations with Massachusetts and Florida authorities.

63. Defense counsel did not depose FDLE case agent Joe Mitchell regarding the substance of John Sweet's immunity negotiations with Massachusetts and Florida authorities. (PC 163-64)

B. Failure to Move for Change of Venue

64. Mr. Kelley's first trial ended in a hung jury.

65. Shortly thereafter, a newspaper published unsubstantiated information that there had been a single holdout juror at Mr. Kelley's first trial. (PC 61-62)

66. Several individuals from the jury venire for Mr. Kelley's second trial had been exposed to information about the case. (R 159-62, 164, 166, 215, 272, 275, 279, 282-83, 329, 340, 341, 353, 385) Several venirepersons stated that they knew the victim's family or were related to the victim's family. (R 161-62, 275) Several venirepersons stated that they could not be objective and could not presume Mr. Kelley innocent because they had followed the case. (R 164, 219, 259)

67. Defense counsel did not move for a change of venue. Mr. Edmund testified that his experience in this circuit was that a motion for a change of venue was an exercise in futility; that trial judges typically will not entertain such motions until jury selection has been attempted and some difficulty has been encountered. (PC 330) The state court found that the venue matter was discussed and rejected for strategic reasons and that there was no problem seating a jury in Highlands County. Highlands County had experienced an explosive growth prior to trial, and a large number of jurors had not lived in the county at the time of this murder. In addition, the defense used much less than the number of peremptory challenges allowed by law. *(Kelley v. State*, 569 So. 2d at 760)

C. Conduct During Trial

68. At Mr. Kelley's first trial, the jury requested a re-reading of Sweet's entire testimony. After having this testimony read back to them, the jurors announced that they could not reach a verdict. (PWHC Appendix 9)

69. At Mr. Kelley's second trial, the jury submitted a question asking whether Sweet "had anything to gain by his testimony." Sweet's testimony was not read back to the jury. (R 925) After a lengthy discussion with counsel, the court advised the jury that it could not comment on the evidence, and noted that the jury had the right to request portions of the testimony be read back if they could "clearly identify the portions" they wanted to hear "if it's not too lengthy." (R 934-36) The jury did not request to have any of the testimony reread. (R 935-936)

70. John Sweet testified that "if [he] mentioned William Kelley's name [at his own trial,] that [he] wouldn't be around today." (R 600-01) Defense counsel did not object. Defense counsel Edmund testified that his trial strategy was to paint as negative a picture of Sweet as possible, even if it meant admitting negative evidence concerning Mr. Kelley. (PC 324-25)

71. John Sweet testified that he was "afraid of' Mr. Kelley. (R 640, 666) Defense counsel did not object.

72. Sweet was questioned concerning an alleged encounter he had with Mr. Kelley in 1981, arising out of a marijuana transaction. In response to defense counsel Edmund's question: "He didn't kill you did he?," Sweet explained that the reason Mr. Kelley did not kill him was "Because his cohort that was there run [sic] out and said, Bill, no killings tonight. Everybody knows you're here." (R 669)

73. Defense counsel Kunstler characterized the above exchange as "horrendous strategy if it was [strategy at all]." (PC 125-26)

74. Co-counsel Edmund did not assert that it was a deliberate trial strategy to concede Sweet's account of a drug-related knife assault on him by Mr. Kelley.

75. During the testimony of Massachusetts Police agent John Kulik, defense counsel Edmund stated in front of the jury: "I would like to make this statement now that the tag number on the car over there that was 'signed in by Kelley' is the one that was on the car in 1966." (R 755) Co-counsel Kunstler considered this comment tantamount to an admission that Mr. Kelley was the individual at the Daytona motel. (PC 92) Defense counsel Edmund testified that this was "not too smart," was not a part of his trial strategy or tactics, and gutted "that part of the defense," to wit, that Mr. Kelley was not involved. (PC 377) The state courts found Mr. Edmund's stipulation to be reasonable trial strategy, noting that other evidence of the registration was also before the jury. *(Kelley v. State*, 569 So. 2d at 759)

76. Co-counsel Kunstler testified that at one point during the trial he thought Edmund might have been "throwing the case." He testified that he subsequently swept this thought aside. (PC 52-53, 169-70)

E. Failure to present a defense

77. Mr. Kelley's attorneys rested their case without presenting a single piece of evidence on behalf of their client. Both defense attorneys agreed on the trial strategy of resting the defense case without presenting a witness, in order to preserve their final closing argument. (PC 121, 321, 326, 331)

78. Even after investigators had uncovered much of the evidence in the case, including Sweet's telephone calls to Walter Bennett's store, Sweet's calls to the Daytona area the

weekend of the murder, and motel records indicating that Andrew Von Etter, his wife, and a "Mr. and Mrs. William Kelley" had stayed at the Daytona Inn that weekend, the investigators still considered one Stephen Busias a major suspect. On March 15, 1967, Lieutenant John J. Kulik of the Massachusetts State Police provided FSB case agent Roma Trulock with thirteen photographs of individuals from the Boston area, including Busias. (PC 226, 234; PC Def. Ex. # 18; PWHC Appendix 33)

79. On August 3, 1967, during a meeting at which they discussed the possibility of John Sweet entering a plea, Agent Trulock showed Sweet a number of photographs, including one of Mr. Busias. (PWHC Appendix 2)

80. In 1966, Stephen Busias was in his mid- to late thirties but looked older, was the same height as Ms. Carter's description, had dark curly hair, and a deep husky voice. (PC 206-09; PWHC Appendices 29 and 30) These characteristics match the description given by Kaye Carter of the man who had registered at the motel as "William Kelley."

81. According to Sweet, Walter Bennett was the broker of this murder for-hire. Stephen Busias was a known associate of Bennett. Busias was also known to spend a great deal of time with Jeannie Adams, the owner of the car alleged to have been used to transport the murderers from Boston, to Daytona Beach, to Sebring, to the Maxcy home, and back to Boston. Busias was known to use Adams's car. (PC 206; PWHC Appendix 29)

82. Defense counsel failed to investigate the possibility of Stephen Busias's involvement in the murder. Specifically, counsel failed to interview Michael Flaherty, who was available to testify to the fact that Stephen Busias was

extremely violent, always strapped for cash, and fit Kaye Carter's description of the "William Kelley" who had checked in to the Daytona Inn motel. Flaherty was also prepared to testify that a few months after the Maxcy murder, Busias began spending money far beyond his usual means. (PWHC Appendix 29) Michael Flaherty was not presented as a witness at the state postconviction evidentiary hearing.

83. Defense counsel failed to interview Stephen Busias's son, Charles Busias, who was available to testify that his father often worked for Walter Bennett, went to Florida around the time of the murder as a favor to Walter Bennett, and that his family's financial situation improved dramatically soon after his father's return from Florida. (PWHC Appendix 30) Counsel also failed to interview Hobart Willis, who was available to testify, and to whom Stephen Busias had confessed the killing of Von Maxcy. (PWHC Appendix 31) Charles Busias and Hobart Willis were not presented as witnesses at the state postconviction evidentiary hearing.

84. Defense counsel Edmund stipulated to testimony that the sheet used to cover the victim contained four slits of three by eight inches. This "fact" is inconsistent with the information contained in the stipulated witness' lab report. (R 707-08)

85. Defense counsel Edmund admitted that entering into this stipulation was an error and not a part of trial strategy. (PC 26, 378-80)

86. Both defense counsel testified at the state postconviction hearing that they made mistakes during the trial, and would have approached certain matters differently given another chance, but the state courts acknowledged their responsibility to avoid the distorting effects of hindsight, and to defer little weight to the attorneys' admissions of ineffectiveness. (3.850

Order; *Kelley v. State*, 569 So. 2d at 761).

87. Defense counsel stipulated to the testimony of witnesses who would have introduced evidence of a motel registration record for "Mr. and Mrs. William Kelley" in Daytona Beach the weekend of Mr. Maxcy's murder. (R 704-05)

88. Post conviction handwriting analysis determined that it was not Mr. Kelley's handwriting on the motel registration. (PC Def. Ex. #13)

89. The state courts noted that the State never contended that the defendant himself signed the registration. *(Kelley v. State, 569* So. 2d at *759)*

F. Failure to Explore Timing of the Murder

90. John Sweet claimed that the killers arrived at Von Maxcy's house between 4:30 and 5:00 PM.

91. Jackie Carlton Davis testified that she saw Mr. Maxcy's car leave the residence with two individuals in it "about dusk," some time between 6:30 and 6:45. (R 546)

92. There was no testimony presented at the state court hearing with regard to the alleged inconsistencies in the timing of the murder. However, the courts did note that Mr. Edmund commented on the time factor in his closing argument. *(Kelley v. State,* 569 So. 2d at 759)

CLAIM III

93. In 1976, John Sweet's prosecutor, then-Florida State Attorney Glen Darty, sought and received a court order

authorizing the destruction of physical evidence from the Von Maxcy murder. (PWHC Appendices 12-14)

94. At the time of the destruction of evidence in 1976, there was insufficient evidence to proceed against Mr. Kelley. (R 82)

95. At Kelley's trial, former prosecutor Glen Darty testified that at the time of destruction, he had "no evidence, basically, to connect" Kelley to the crime. (R 82; *Kelley v.* State, 486 So.2d 578, 581 (Fla. 1986) ("Obviously, the state had insufficient evidence to proceed against appellant [Mr. Kelley] until Sweet offered his testimony in 1981."))

96. The destroyed evidence consisted of a bloody bedsheet with rips in it, a section of the victim's shirt, a bullet taken from the scene of the crime, a tire from the victim's car that had been slashed several weeks before the murder, car rental agreements, motel records, and telephone and bank records that had been used in Sweet's trial as evidence of his arrangements for the murder.

97. Copies of all documentary evidence susceptible to photocopying were preserved and copies thereof were used at Mr. Kelley's trial. *(Kelley v. State,* 486 So. 2d at 580)

98. Physical evidence that was to have been maintained by the Florida Department of Law Enforcement was never presented at Mr. Kelley's trials and has not been accounted for. These items include latent fingerprint lifts, hair and fiber evidence, blood specimens, blood stained carpet runners and sections, scrapings taken from the victim's car, four knives found in or near the victim's home, metal fragments taken from the victim's head, a land contract found on the victim's person between the victim and Sweet that was declared by the

original investigation to have been forged, and tape recordings of telephone conversations between John Sweet and Irene Maxcy.

99. On direct appeal from Kelley's conviction, the state court held that, "While we find the destruction of evidence in this case unfortunate, we cannot read the facts as hinting at intentional behavior by the state affecting appellant's substantial rights. While extremely hesitant to condone the state's behavior here, we find no negligence in its actions. . . . We wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case, the result might well be different." *(Kelley v. State,* 486 So. 2d at 58 1-2) The state courts found that the destruction of evidence did not prejudice Kelley's case, or create "an otherwise non-existent reasonable doubt." (Id. at 582)

CLAIM IV

100. Prosecution witness Abe Namia was permitted to testify at Mr. Kelley's trial for the purposes of corroborating John Sweet's testimony regarding Mr. Kelley's involvement in the murder. He was to testify as to the contents of conversations he had with Sweet before Sweet's trials in 1967 and 1968.

101. Mr. Namia testified that during his investigation of the Maxcy murder before Sweet's trials in 1967 and 1968, he and John Sweet discussed William Kelley. The consecutively-dated 130 pages of reports (eighty-four pages of which chronicle his trip to Boston), prepared by Mr. Namia during his investigation, contained no reference to the conversations with Mr. Sweet about which Mr. Namia testified. (R 799,

806) Namia testified that these reports contained "what John Sweet had told [him]." (R 774)

102. John Sweet testified that he never spoke to anyone about the planning and execution of the murder until February of 1981. (R 672-73)

103. Mr. Namia testified that he failed to record his conversations with John Sweet because Mr. Namia was only interviewing potential state witnesses on behalf of Sweet's defense. (R 808-09) Mr. Namia's reports contain records of interviews with Aubrey Williams, James Haines, Kenneth Weinel, and Roger Miller. His reports also indicate unsuccessful efforts to interview Ernest Higgins, Charles Davis, and Alice Piasecki. All of these individuals were called as defense witnesses by Mr. Sweet.

104. On March 29, 1984, defense counsel requested that the trial court prohibit Mr. Namia' s testimony. This motion was denied. (R 764)

105. A continuing objection to Mr. Namia's testimony as to what John Sweet "said to him" was made and allowed during direct examination. (R 764, 770)

106. John Sweet testified that he had contacted Walter Bennett to arrange Mr. Maxcy's death (R 573) and thereafter dealt with him directly.

107. Abe Namia testified that John Sweet dealt with Walter Bennett's brother Wimpy Bennett and that Irene Maxcy, and not John Sweet, was the one in contact with Bennett. (R 770)

108. John Sweet testified that he had never met Kelley

before October 3, 1966, and that he did not know Mr. Kelley's address until after 1970 at the earliest (R 603), yet Namia testified that while he and Sweet were in Boston in 1967, Sweet "had pointed out a residence that was supposed to be the home of Mr. Kelley." (R 768)

109. John Sweet testified that he drove the killers to the Maxcy home in their car (R 589), yet Abe Namia testified that Sweet told him that he drove the killers to the Maxcy home in his own car. (R 771-72)

110. John Sweet presented no testimony concerning aborted attempts to murder Mr. Maxcy, yet Abe Namia testified that Sweet told him about two earlier attempts to murder Mr. Maxcy, including one incident in which Mr. Maxcy's tire was slashed. (R 770-71)

111. Abe Namia testified that Sweet told him that "the first contact . . . was with two young men, who flew down from the Boston area." (R 770) He testified that Sweet told him that these men were given a ride to town by a deputy sheriff but that they returned to Boston without doing the job. (R 770-71) He testified that according to Sweet the "second one . . . approached" came to Sebring and was taken by Sweet "to Maxcy's car so it could be identified." (R 771) He testified that Sweet told him that this "second one" had cut Maxcy's tire, remained there until Maxcy came back and assisted in changing the tire so he could readily identify the man." (R 771)

112. John Sweet did not testify to any of the information contained in the above paragraph.

113. John Sweet testified that he never made any of these

statements to Abe Namia. He testified that he never confessed his involvement in the Maxcy killing to Abe Namia or any private investigator. (R 672-73)

114. Defense counsel never deposed Namia.

115. During the defense's cross-examination of Namia, the judge called a recess, at which point defense counsel requested that the prosecutor be instructed not to talk with Mr. Namia during the recess. The judge replied "[y]ou are implying something of the District Attorney?" and denied the request. (R 798)

116. During the recess, the prosecutor did confer with Mr. Namia and showed him the reports regarding which he was being cross-examined. (R 799)

117. Neither defense attorneys nor the court were present during this off-the-record meeting between the prosecutor and Namia.

118. This claim was initially presented to the state courts as a question of state law on the admission of Namia's testimony, and Kelley's attempt to expand the claim in state postconviction proceedings to one of prosecutorial misconduct was found to be procedurally barred. *(Kelley v. State,* 486 So. 2d at 582; *Kelley v. State,* 569 So. 2d at 756)

119. The state courts approved of the admission of Abe Namia's testimony as prior consistent statements by Sweet, proper to rebut Kelley' s inference of improper motive for fabrication; *(Kelley v. State,* 486 So. 2d at 582)

Respectfully submitted,

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APPENDIX L

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 4, 2005 [sic]

Mr. Laurence H. Tribe
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138

Re: William H. Kelley v. James V. Crosby, Jr.,
Secretary, Florida Department of Corrections
Application No. 04A532

Dear Mr. Tribe:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on March 4, 2005 [sic] extended the time to and including March 4, 2005.

This letter has been sent to those designated on the attached notification list.